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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 535.

ILLINOIS CENTRAL RAILROAD COMPANY, YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, AND J. B. BOOTHE ET AL., THEIR SURETIES, PLAINTIFFS IN ERROR,

vs.

V. P. MESSINA.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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FILED JUNE 30, 1915.

(24,818)

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1&2 Minutes of Circuit Court, Holmes County, Mississippi, February Term, 1913, the First Day of the Term, and the 24th Day of February, 1913.

STATE OF MISSISSIPPI,
Holmes County:

Be it remembered that — a regular term of the Circuit Court, begun and held at the Court House in the City of Lexington, Holmes County, Mississippi, on the 24th day of February, 1913, the same being the time and place prescribed by law therefor.

Hon. Monroe McClurg, Judge of the Fourth District of Mississippi, presiding; Hon. T. E. Mortimer, District Attorney for said District; W. L. Smith, Sheriff of said County; J. D. Weeks, Clerk of said Court; and B. C. Trigg, Official Stenographer.

Among other causes then and there heard was one in the following words and figures, to-wit:

No. 3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

3 In Circuit Court, Holmes County, Mississippi, February Term, 1913.

V. P. MESSINA, Plaintiff,
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendants.

The plaintiff V. P. Messina, by his attorneys complains of the defendants, Illinois Central Railroad Company and Yazoo and Mississippi Valley Railroad Company, of a plea of trespass on the case, and for cause of action alleges as follows, to-wit:

On the — day of July, 1912, the said defendants were each railroad corporations, engaged in the business of carrying passengers and freight for hire, as common carriers, within the State of Mississippi, and were partners in trade and in the business aforesaid, operating said railroads, as partners aforesaid, in Holmes County, Mississippi, and in other counties: that, on the track of the Illinois Central Railroad Company, on the day aforesaid, the defendants were operating a passenger train, which ran from Canton, Mississippi, to Memphis, Tennessee; being number Two; that said train was being operated by the then agents and servants of defendants in charge of said train, pursuant to the business of defendants aforesaid, as common carriers of passengers for hire; that the plaintiff

V. P. Messina, was riding upon the engine of said train, by permission of the agent of the defendants in charge of said engine, and, while so riding, the said V. P. Messina was injured, by the negligent running of said train, on said date, at a point about three miles South of Winona, in Montgomery County, Mississippi, said injury being caused by the negligent running of the said train as aforesaid,
by which the said train caused to leave the track, and the
4 engine thereof to turn over, causing the injury to plaintiff hereinafter named.

Plaintiff alleges that, by reason of said negligence, and the turning over of said engine, plaintiff's right leg and right arm were broken, and his back was injured, and the wrist of his right hand was injured, so as to render the same stiff and useless; that the breaking of the plaintiff's leg and arm was such as to render each of said limbs entirely useless and permanently destroyed; that, by reason of said injury, the plaintiff lay in bed for many months, and, in order to save his right leg, had seven seperate and -sitinct surgical operations performed upon him, each of which caused him great pain and suffering, and, since the date of said injury, the plaintiff has constantly suffered great pain and injury, and continues to suffer, and will continue to so suffer during the remainder of his life; that, in an effort to save the life of the plaintiff, he expended over $2,000 in money, for medical and surgical and hospital treatment, all of which has entirely failed to relieve the plaintiff, so that, at this time, by reason of the negligence of the defendant- aforesaid, he has been rendered a helpless cripple during the remainder of his life, and rendered incapable of working or of earning any money; that, before said injury, the plaintiff was a strong, healthy, active man, earning large sums of money, to-wit more than $100 per month, and being a young man only twenty-four years of age; the plaintiff has been rendered wholly incapable of earning any money or performing any manual labor.

By reason of the injury and negligence aforesaid, he has been damaged in the sum of $25,000, and brings this suit against defendants,
and prays judgment for said sum of $25,000 and his costs in
5 this behalf expended.

Count 2.

And for further count, the plaintiff says as follows:

The defendant- aforesaid, at the time and place aforesaid, were operating a passenger train as aforesaid, and as partners as aforesaid; that, at Canton, on defendants' Illinois Central Railroad Company's railroad, the plaintiff was given permission, by the engineer then in charge of said engine, and who was then and there the agent and servant of defendants, in charge of said train, to ride upon said engine; that the plaintiff, with permission as aforesaid, did enter upon said engine, and was riding thereon, the said train proceeding North; that the agent and servant of the defendant in charge of said engine, having given the plaintiff permission to ride thereon, owed him the duty not to recklessly, or willfully or wantonly, or in a grossly neg-

ligent manner, injure him, and owed him the further duty to operate said engine in such a way as not to wilfully, wantonly, recklessly, and in a grossly negligent manner cause injury to plaintiff, or any other persons riding upon said train; that the said agent and servant of the defendant, in charge of said engine as aforesaid, knowing that the plaintiff was then and there riding upon said engine, wilfully, wantonly, recklessly, and in a grossly negligent manner, and in utter disregard of the rights or safety of the plaintiff, ran said engine into water that was then passing over the track of the defendant, and upon and into a trestle that had been washed out, after receiving full knowledge and notice that the track of the defendant was under water, or defective, because of continued rains, by reason of which wilful, wanton, reckless, and grossly negligent conduct, upon the part of the agent and servant of the defendant in charge of said train, the said locomotive and cars of said train was caused to turn over and leave the track of the defendants,
6 causing the plaintiff to be held between a part of the wreckage of the said engine, and causing him injury and damage as set forth in this declaration; by reason whereof, the plaintiff has been injured and damaged as set forth in the first count of this declaration, and prays damages against the defendants in the sum of $25,000 and his costs in this behalf expended.

Count 3.

And for further count, the plaintiff alleges as follows, to-wit: The defendant- aforesaid, at the time and place aforesaid, *was* engaged in the business aforesaid, as partners aforesaid, and were operating a certain passenger train as aforesaid, and the plaintiff was then and there an employee of the defendant, Illinois Central Railroad Company, as a switchman in the yards of the defendant at Jackson, Mississippi; that, at the time aforesaid, the plaintiff was temporarily off duty and upon a short vacation of a day or two; that it was the known, recognized, and established custom of the defendants to carry the employees of the defendants from place to place upon the defendant's line, such custom and practice being known to the plaintiff, that, pursuant to such custom, the plaintiff, not having obtained a pass, as the defendants' said custom entitled him to, and which was a part of his contract of employment with the defendant, obtained and was given permission, by the then agent and servant of the defendants in charge of the said locomotive, to ride from Canton to Memphis; that the said engineer gave permission to the plaintiff to ride on said engine, then knowing and recognizing the custom of the said defendants to so carry their employees; and the said agent and servant of the defendants, in charge of said engine as aforesaid, after *excepting* the plaintiff upon his engine, pursuant to the custom and rule as aforesaid, owed to the plaintiff the duty to handle
7 the said engine with reasonable care and caution, so as not to inflict injury or harm upon the plaintiff, or any other persons riding upon said train; that the said engineer, after accepting the plaintiff upon said engine, pursuant to said rule and custom afore-

said, and knowing that the plaintiff was riding thereon, received orders or warning that the track of the defendant, at or near the town of Winona, on defendant's said railroad, was either under water, or in such condition that made it proper that the said engine should be run with care and caution over said track; that, after receiving such notice or warning, which warning was that the said engineer should proceed with great caution at t[illegible] point aforesaid, the said engineer wilfully, wantonly, recklessly and in utter disregard of the safety of the plaintiff and passengers upon said train, ran said train at a rate of sixty miles an hour along the very point where he had been given warning to proceed with great caution, and upon and into water which was passing over the track of the defendant, for a distance of several hundred yards and then into and through a defective trestle, which was rendered defective because of the water being over it as aforesaid; that, by reason of said wilful, wanton, and reckless conduct, the engine and cars of said train were turned over and thrown from the track and wrecked, and the plaintiff injured as set forth in the first count of this declaration, and therefore plaintiff brings this suit for said injuries, and prays damages against the defendants in the sum of $25,000 and his costs in this behalf expended.

Count 4.

And for further count, the plaintiff says that the defendants aforesaid, at the time and place aforesaid, were operating said pas-
8 senger train as aforesaid, and were partners as aforesaid, and the plaintiff, riding upon the defendants' engine as aforesaid, became and was a mere trespasser thereon, and was not a wilful trespasser, and there was no danger while the plaintiff rode upon said engine, as long as the same was not handled in recklessly, wilfully, or wantonly negligent manner; that the said plaintiff being a mere trespasser or licensee as aforesaid there was owing to him the duty, by the agents and servants of the defendant in charge of said engine not to handle the same wilfully, wantonly, and recklessly, negligently, or in a way that would wilfully and wantonly and recklessly cause injury or damage to the plaintiff; that the agents and servants of the defendant wholly failed in this regard, and, while the plaintiff was riding on said engine, with knowledge of the agent of the defendant in charge of said engine, the said engine, by said agent aforesaid, was wilfully, wantonly, and in a grossly negligent manner, and in a manner which evinced an utter disregard of the rights of safety of the plaintiff, ran into water, and into a defective trestle, after receiving warning and notice of the danger and of the caution necessary to be exercised in the handling of said engine, at a point a few miles South of Winona, and by such negligence and wilful, wanton, and reckless conduct, upon the part of the agents and servants of the defendant, caused the injury and damage to the plaintiff as alleged in the first count of this declaration.

And therefore the plaintiff brings this suit, and prays judgment against the defendants in the sum of $25,000 and his costs in this behalf expended.

Count 5.

And for further count, the plaintiff alleges as follows, to-wit:

9 The defendants aforesaid, at the time and place aforesaid, were partners aforesaid, and were operating a certain passenger train as aforesaid, and the plaintiff was riding upon said engine as aforesaid, and was injured by the running of said train, by the said train becoming wrecked because of a washout, and by said wreck the plaintiff was caught between certain of the wreckage of the said train, and received the injuries set forth in the first count of this declaration; that the plaintiff was an employee of the defendants as aforesaid, then temporar-ly off duty as aforesaid; and by defendant's contract of employment of plaintiff he was owed the duty, of reasonably prompt medical and surgical attention, in case of accident, that said injury to plaintiff occurred at half past three o'clock in the morning, at a point three miles South of Winona, a point in said State where there was then located a hospital and physicians; that the plaintiff, having received injuries as aforesaid, was suffering great physical and mental pain, and the defendant had trains, hand cars, and other methods then at hand, and readily accessible to properly carry the plaintiff, then and there one of the employees, to said town of Winona, in order that he might receive prompt medical aid, and be given relief from the great suffering as inflicted upon him; that the agents and servants of the defendants, then and there, without reason, wilfully, wantonly, and unhumanly refused and declined to carry the plaintiff to said town of Winona, although the said defendants, then and there by hand cars and other readily accessible means, were carrying injured passengers and injured parties promptly to said town of Winona for relief, wilfully, and wantonly refused to carry the plaintiff to said town, but inhumanly and wilfully and wantonly permitted the plaintiff to lay upon the ground from half past three in the morning until after eleven o'clock

10 in the morning, at no time giving relief or aid to the plaintiff, at which time, that is, eleven o'clock, (the plaintiff through sympathy and kindness of other parties, was carried in a road wagon, to said town of Winona, and placed in the hospital, that the said delay, from 3:30 o'clock in the morning, or from a time when the defendants could have carried plaintiff to relief, until the time when he was actually given relief, caused the plaintiff to suffer the greatest physical and mental pain, and caused his injuries to become worse, and by the delay caused the plaintiff to suffer injuries that could have been prevented by prompt treatment; that, by reason of said delay, the injury to plaintiff was made greater and worse, so that because of said delay, it has been necessary to operate upon the plaintiff seven times, and has caused him to expend large sums of money for medical aid, to-wit: the sum of $2,000 and has caused plaintiff to become hopelessly crippled, and rendered helpless, and unable to earn any money, or to do any manual labor, that the negligence of defendants, in failing to carry the plaintiff to relief was without excuse or reason, as the same could have been done without any costs, inconvenience, or danger to the defendants, or any of their crew of employees, and the act of the defendants, through their then

servants, in not carrying the plaintiff, was characterized by brutality and inhumanity.

Wherefore, for the negligence aforesaid, the plaintiff brings this suit, and prays damages against the defendants, in the sum of $25,000 and his costs in this half expended.

BARBOUR & HENRY.
BURCH & STRICKER.

Filed Jan. 20, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

11 3527.

V. P. MESSINA
vs.
I. C. & Y. & M. V. R. R. Co.

Plaintiff moves the court for permission to amend this declaration by filing an additional count, copy of which has been handed defendant's counsel.

BARBOUR & HENRY,
Attorneys for Plaintiff.

3527. V. P. Messina vs. I. C. & Y. & M. V. R. R. Motion to amend Declaration. Filed Mar. 6, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

12 In the Circuit Court of Holmes County, Mississippi.

3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY, YAZOO & MISSISSIPPI VALLEY RAILROAD CO., Defendants.

And for further count, and by way of amendment to the original declaration, leave of the court having been obtained, plaintiff alleges as follows, to-wit:

The defendants aforesaid at the time and place aforesaid were partners as aforesaid and operating a train as aforesaid and the plaintiff was injured by riding upon the engine aforesaid by the said train becoming wrecked because of a washout as aforesaid, and the plaintiff was caught between certain of the wreckage and received injuries as aforesaid; that at the time aforesaid the plaintiff was an employee of the defendant Illinois Central Railroad Company at its yards in Jackson, Mississippi, and then temporarily off duty; that by the injury aforesaid the plaintiff was rendered unable to help himself, and after the said wreck lay helpless and at times unconscious upon the said wreckage, with his clothing soaked in water;

that the agents and servants of the defendant then in and about the business of the defendant knew that the plaintiff then and there was an employee of the defendant aforesaid, then temporarily off duty, and knew and saw that the plaintiff was injured as aforesaid, to-wit: His limbs being broken and his body badly mangled and he rendered utterly helpless; that thereupon it became and was the duty as an act of simple humanity to the plaintiff, who was then an employee as aforesaid, to move the plaintiff to a place or point where medical or surgical attention or aid could have been given him, that
13 the place of said injury was only three miles from Winona, where there was then a hospital with surgeons and physicians in the employ of the defendant railroads; that it would have cost nothing to carry the plaintiff to said medical or surgical aid as the defendants then and ther- had hand cars and engines and trains which was passing from the scene of said wreck to the said town of Winona; yet the defendants utterly disregarded their duty to the plaintiff in the premises and utterly unmindful of the duty which the law and humanity imposed upon them wilfully, wantonly and negligently refused to carry the plaintiff to said town of Winona, but wilfully, wantonly and inhumanely permitted the plaintiff to lay for a while upon the ground with his clothing soaked in water, and thereafter placed the plaintiff in one of its cars at the scene of said wreck and there kept the plaintiff until nearly one o'clock of the day so that the said plaintiff by the acts of the defendants as aforesaid was caused to lay with his clothing wet and his limbs broken and his body mangled from half past three o'clock in the morning until one in the evening, during which time the plaintiff suffered great mental and physical pain and his injuries which were grievous and serious made worse, and by reason of the delay plaintiff's body was rendered in that condition that the medical aid and surgical attention given him for the delay aforesaid was unable to cure him, but that had he been given the attention which he could have received if he had been carried to Winona Plaintiff could and would have been made well, and his limbs so treated that he would have regained use of them whereas, because of the delay and negligence aforesaid he is rendered helplessly and hopelessly crippled for the remainder of his life, for the reason of the fact that his left arm was rendered wholly useless, his left leg caused to be operated
14 on seven times and his right arm is partially destroyed so that he only has a limited use thereof.

Plaintiff alleges that the defendants took the plaintiff into their charge by placing him in one of their cars and assumed to take care and charge of him, and thereafter wilfully and wantonly refused, although often requested by the plaintiff to give that attention which common humanity requires, wherefore, the plaintiff alleges and by reason of the negligence he has been injured and damaged in the sum of Twenty-five Thousand Dollars ($25,000.00) and therefore prays judgment for said sum and the costs in this behalf expended.

BARBOUR & HENRY,
BURCH & STRICKER,
Attorneys for Plaintiff.

It is agreed that the plea of general issue and notice thereunder filed to the original counts of the declaration shall extend to this additional count.

BARBOUR & HENRY,
BURCH AND STRICKER,
Attorneys for Plaintiff.
NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

Filed Mar. 5, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

15 STATE OF MISSISSIPPI,
Holmes County:

In Circuit Court, February Term, 1913.

3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

And said defendants by their attorneys come and defend the wrong and injury then etc. and say that they are not guilty of the premises in manner and form as the plaintiff has in his declaration alleged; and defendants jointly and severally deny each and every allegation in each and all the counts of said declaration and of this the defendants put themselves upon the country.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

MAYES AND MAYES,
Of Counsel.

A copy of the above plea handed to Barbour and Henry, attorneys for defendants, Feb. 24th, 1913.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

16 STATE OF MISSISSIPPI,
Holmes County:

In the Circuit Court, February Term, 1913.

Illinois Central Railroad Company and Yazoo and Mississippi Valley Railroad Company—

The defendants in this cause hereby give notice to said plaintiff that they will offer evidence under the general issue to prove that said plaintiff was one of seven of his kind, who were beating their way North on train No. 2 at the time he was injured, that he was riding on the rear sill of the engine tank at the time he received the injury complained of, and was there riding at the time of the derailment of the train.

That on the arrival of train No. 2 July 18th, 1912, at Durant, plaintiff was one of four tramps who got out from the first "blind" immediately back of the engine tender on the East side of the train, which was the dark side. They were seen by the police officer W. R. Johnson and begged him not to arrest them and send them to the farm, and plaintiff said he was out of a job and had no money, and that they were on their way to Memphis; that the officer told them not to do it and reminded them of a wreck a few days before in which some hoboes were killed near Winona. He told them he would not arrest them if they would leave town, and warned them to keep off that train, which they promised to do. Plaintiff with three others started North about the time the train pulled out and running along beside the train all four succeeded in getting back again on the train at the same place they were riding before.

That the cause of the derailment was due to train No. 2 running into a stretch of track at bridge 643-01, from which the gravel ballast had been washed for a distance of 350 feet by overflow
17 from Murrels Branch, a small creek that crosses the railroad at that point.

That the rainstorm in the vicinity of Foltz and Winona was not unusually hard, and the evidence at bridge 643-01 and the observations made West of the Railroad and along Murrels Branch and the absence of high water in the immediate vicinity South of this point, showed that the water that overflowed the track was due to a very hard rainstorm about 2 miles West of the railroad on Murrells Branch. That where the track washed out it is higher than at any other point for three fourths of a mile North and several miles South, and is usually not affected by overflow. That trains, including No. 2, were notified of prevailing weather conditions in as much detail as was obtainable, and that train No. 2 had lost nine minutes between Durant and point of derailment on account of the message in possession of the crew regarding rain in that territory, although it did not rain on train No. 2 between these points, and that the speed of the train was between 20 and 35 miles per hour when derailed as against the usual rate of about 55 miles per hour.

That the headlight of engine No. 1062 was burning brightly, crew had proper rest prior to starting on trip, and that the extreme darkness together with the presence of curveture in track and a rise in grade immediately South of bridge 643-01 operated to obscure the view ahead.

Defendants will introduce rule 728 of the Transportation Department of the Illinois Central Railroad Company which reads as follows: "No person will be permitted to ride on an engine, or any baggage, mail or express car (except employees in the discharge of their duties) without a written order from the Superinten-
18 dent." It is not only contrary to the rules but the engineer himself has no right to waive it and permit people to ride on his engine, whether they be in the employ of the Company or not.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

A copy of the above plea mailed to Barbour and Henry attorneys for plaintiff, Yazoo City, Miss., Feb. 25th, 1913.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

19 STATE OF MISSISSIPPI,
Holmes County:

In Circuit Court, February Term, 1913.

3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD CO. and YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

The defendants by their attorneys, come and say jpintly and severally, that they do not admit the existence of any partnership between them; but while this is true, they do not care to raise any issue *as* this allegation of the plaintiff, in the several counts of his declaration, since in the end the matter can be easily solved between the defendants themselves, and the proper company will pay whatever judgment may be rendered against either or both.

And said defendants by their attorneys come and defend the wrong and injury when etc., and say, that they are not guilty of the premises in manner and form as the plaintiff has in his declaration alleged, and defendants deny each and every allefation in each and all counts of said declaration. And of this the Defendants put themselves upon the country.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

MAYES & MAYES,
Of Counsel.

A copy of the above plea handed to Barbour & Henry, attorneys for plaintiff, Feb. 24th, 1913.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

Filed Feby. 24th, 1913. J. D. Weeks, C. C., By E. V. Ashley, D. C.

20 In the Circuit Court of Holmes County, Mississippi, February Term, 1913.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

The defendants will take notice that the plaintiff intends to give in evidence in denial of avoidance of the special matter set up in the notice *set up* by the defendants under the plea of the general issue, as follows:

A specific denial will be made that the plaintiff was warned by W. R. Johnson, or any other person, at Durant, but will show that he was riding on the engine by permission of the engineer, who, by the custom known and recognized by the defendants, had authority to permit the plaintiff to ride thereon.

He will further show that the place where the engine was wrecked was not higher than at other points of the track, and was not a place where the defendant had a right to expect that no accident would occur, but will show that the place was one where an accident would occur, by reason of the trestle being washed out because of rains, admitted by the defendant in its special notice to have occurred, and will further show that, at the identical point, shortly before the accident involved in this case, another train of the defendant was ditched, because of the condition of the track at that point, due to rains.

The plaintiff will further show that, at the time of the accident, a blinding rain was falling; that the train was traveling at a rate of more than sixty miles an hour; that there was no curve where the engine left the track and that, by the rules of the company, the duty was upon the engineer to keep a close and vigilant watchout when running his engine during a storm, or just after a storm, such as the one in progress at the time of the accident, plaintiff will
21 further show that no such rule set out in the special notice exists, but, on the contrary, under the rules of the company, the engineer was responsible for the engine, and had authority, by rule and by recognized and known custom, to permit employees to ride thereon.

BARBOUR & HENRY,
Attorneys for Plaintiff.

22 STATE OF MISSISSIPPI,
Holmes County:

In the Circuit Court, February Term, 1913.

3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY; YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY.

Before me the undersigned authority this day personally appeared, J. B Boothe of counsel for said defendants, who made oath in due form that he had reason to believe and does believe that said plaintiff cannot be made to pay the costs of this suit if the same be adjudged against him.

Affiant also states that said defendants have, as he believes, a meritorious defense, and that this affidavit is not made for delay.

J. B. BOOTHE.

Sworn to and subscribed before me this 22nd day of Feb., 1913.

J. D. WEEKS,
Circuit Clerk.

3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

And now come the defendants by their attorneys and move the court to require said plaintiff to give security for costs on affidavit filed.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

A copy of the above affidavit and motion handed to J. V. Barbour, attorney for plaintiff, Feb. 24th, 1913.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

V. P. Messina vs. I. C. & Y. & M. V. R. R. Motion and Affidavit. Filed Feb. 22, 1913. J. D. Weeks, C. C.

23 In the Circuit Court of Holmes County, Mississippi.

V. P. MESSINA
vs.
ILLINOIS CENTRAL R. R. COMPANY et al.

Know all men by these presents that we, John Lear and T. F. Davis are held and firmly bound unto the State of Mississippi in the penal sum of $250.00, for the payment of which well and truly to be made we bind ourselves, representatives and assigns.

Witness our hands this 25th day of February, 1913.

The condition of this obligation is as follows: — V. P. Messina loses the case filed and now pending in the Circuit Court of Holmes County, Mississippi, wherein he is plaintiff and the Yazoo & Mississippi Valley Railroad Company and Illinois Central Railroad Company are defendants, and shall promptly pay the cost of said suit, to be taxed by the Circuit Clerk of said County, then this obligation shall be void, Otherwise, the same shall remain in full force and virtue, and as security and in obligation upon our part to promptly pay the costs in the above styled cause, to be taxed by the said Circuit Court, in the event of the loss of the said suit by the said Messina, and in the event of the failure of the said Messina to pay said costs.

J. M. LEAR.
T. F. DAVIS.

I certify the above sureties are solvent and entirely good for the amount named above, this Feb'y 25, 1913.

J. H. BUNCH,
Circuit Clerk.

3527. V. P. Messina vs. I. C. & Y. & M. V. R. R. Filed Feb'y 26, 1913. J. D. Weeks, C. C.

24 3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY et al.

And now comes the plaintiff, by his attorneys, and moves the court to set this case for trial on Monday, March 3, 1913, instead of Thursday, March 6, 1913, for the reason that this case was filed long prior to the day of filing of other suits that have been set for trial, on the docket of the Circuit Court of this county, prior to the day of the setting for trial of this case, and for the further reason that Section 692 of the Mississippi Code of 1906 requires that cases shall be set for trial in their numerical order, which was not done in this case, and for the further reason that the plaintiff, nor his counsel, were notified of the setting of the said case, and did not consent or agree that the

case should be set out of its place as contemplated and required by law.

BARBOUR & HENRY,
Attorneys for Plaintiff.

3527. V. P. Messina vs. I. C. & Y. & M. V. R. R. Motion to change date of trial. Filed Feb. 26th, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

25 Minutes Circuit Court, Holmes County, Mississippi.

V. P. MESSINA
vs.
I. C. R. R. et al.

This case being heard on motion to reset for trial, and the Court considering same and deciding that no injustice will be done the defendant by so doing orders that said case be set for call and trial on Monday, March 3rd, 1913, after the case of E. Z. Huston, et al. vs. I. C. R. R. Co., #3524, and all to be called in their numerical order to which action of the court the defendants excepted in open Court and had their exception allowed.

26 No. 3527.

V. P. MESSINA
vs.
I. C. & Y. & M. V. R. R. Co.

Plaintiffs give notice to defendant to produce for us in the trial of this case a copy of the "Rules and Regulations of Hospital Department" of the defendants, which information, or written or pointed rules are in possession of the Defendants, and notice is given that secondary evidence of such rules will be offered in the absence of the production of such rules, by the defendant.

BARBOUR & HENRY,
BURCH & STRICKER,
Attorneys for Plaintiff.

3527. V. P. Messina vs. I. C. R. R. Co. & Y. & M. V. R. R. Co. Notice. Filed March 6, 1913.

27 In the Circuit Court of Holmes County, Miss., February Term, 1913.

3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

To the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, or Noel, Boothe & Pepper, their attorneys of record:

You will please take notice that the plaintiff claims that a written order, or written instruction, was given the engineer Barnett, in charge of the engine of Illinois Central Train No. 2, on the 18th day of July, 1912, being the time, the engine, the train, and the engineer named in the declaration filed in this cause, by the train master, or train dispatcher or the proper officer of the Illinois Central Railroad Company, giving him information or notice that the track upon which the said train was to run from Durant to Winona, and particularly at the place where the injury mentioned in the declaration in this cause occurred, was under water and washed out, on account of heavy and continued rains, and instructing him to proceed with great caution, because of said condition of said track. You will further take notice that the original of this order or instruction or notice is in the possession and custody of the defendant Illinois Central Railroad Company, or some officer thereof, and you are therefore requested to produce the original of said order at the trial of this case, on Monday, March 3, 1913, to be used as evidence in said cause, and you are further notified that, if you fail to produce said order or notice or instruction, that secondary evidence, by parole, testimony, will be introduced by witnesses who saw the said order, and who heard its contents read, showing fully the contents of said order, and that the said order was handed to and read by the engineer in charge of said train, before the acci-
28 dent alleged in the declaration in this cause.

BARBOUR & HENRY,
Attorneys for Plaintiff.

29 STATE OF MISSISSIPPI,
Holmes County:

In the Circuit Court, February Term, 1913.

3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD CO. and YAZOO & MISS. VALLEY R. R. Co.

The above stated case being on trial before the court and jury and the plaintiff having closed his testimony in chief, the defendants come and say to the court that in as much as V. P. Messina, the plaintiff, in his examination as a witness before the jury exhibited his limbs alleged to have been injured by the gross and wilful negligence of defendants, and testified that the injuries were aggravated by the improper medical and surgical treatment of plaintiff at the hospital in Winona, Miss., by the surgeons of said defendants, and although a non-expert witness attempted to explain and show to the jury the manner of such improper treatment, and its effects; now, said defendants move the court to permit the surgeons of said hospital who treated said plaintiff to examine in the presence of the jury said injured limbs and show and explain to them the manner of their treatment and whether or not the same was skillful and proper, according to medical science.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

A copy of the above motion handed to Barbour & Henry, Burch & Stricker and R. C. McBee, attorneys for plaintiff, March 7th, 1913.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

Filed 7th day of March, 1913. J. D. Weeks, Clerk.

30 Minutes Circuit Court, Holmes County, Mississippi, Mar. 7th, 1913, February Term, 1913.

V. P. MESSINA
vs.
I. C. R. R. Co. et al.

During the trial of the above case came on to be heard the motion of defendants to permit the surgeons of the hospital who treated said plaintiff to examine him in the presence of the Jury, *wo* which plaintiff objected, and the court heard and overruled said Motion: To which action of the court, defendants then and there excepted.

31 *Instructions Given Plaintiff.*

3527.

V. P. MESSINA
vs.
I. C. R. R. Co. et al.

(1,

The court instructs the jury that if you find for the plaintiff, that the form of your verdict will be "We the jury find for the plaintiff and assess his damages at the sum of $—, and you are further instructed that if you find for the plaintiff that it is your duty to find for such an amount as under the instructions and the evidence would be full compensation for the injury sustained by plaintiff, not to exceed $25,000.00.

Instruction Given.

3527. V. P. Messina vs. I. C. R. R. Co. et al. Filed Mar. 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

(*Verdict of the Jury Written on This Instruction.*)

We the jury find for the plaintiff and assess his damages at the sum of Ten Thousand Dollars ($10,000.00).

(2)

3527.

V. P. MESSINA
vs.
I. C. R. R. Co. et al.

The court instructs the jury that if you believe from the evidence that plaintiff was an employee of defendant then temporarily off duty, and was riding on the train with the permission of the engineer and that the engineer knowing that the plaintiff was on the engine or train, ran his engine at a point of two or three miles south of Winona, in a manner, which under all the facts and cir-
32 cumstances shown in the evidence, showed recklessness and wilful or wanton negligence in the handling of the train, and that plaintiff was injured thereby, then it is your duty to promptly return a verdict for the plaintiff giving him damages in a sum that will fully compensate him for all loss and damage sustained by him on account of the injury to him. And you are further instructed in assessing damages if you find for the plaintiff, to take into consideration all physical and mental pain suffered by plaintiff from the time of the accident to the present time, as a result of his injuries,

and all pain and suffering, if any, which he will likely suffer in the future, the loss of time by plaintiff since his injury, and the loss of time, if any, in the future that he will suffer, with any permanent impairment of the use of his arm and leg if any, and also any permanent inability to perform physical labor, if any is shown, expense necessarily incurred in an effort to be relieved by medical and surgical aid together with all the facts and circumstances shown in evidence relative to his injuries and sufferings, as a direct consequence of his injuries.

Instruction Given.

3527. V. P. Messina vs. I. C. R. R. Co. et al. Filed Mar. 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

33 The court instructs you that by the use of the words wilful or wanton negligence used in the instructions in this case, it does not mean that the plaintiff must show *and* intention by the agents of the defendant to injure the plaintiff, but it is sufficient to show conduct *fanifesting* a reckless disregard of consequences, under circumstances, where the act is done, or omitted to be done with probable or naturally resulting injury, in other words an act done *of* omitted to be done with *conscienseness* at the time that injury will probably or naturally result therefrom.

Instruction given.

No. 3527. V. P. Messina vs. I. C. R. R. Co. et al. Filed March 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

(44)

You are instructed that the plaintiff was injured by the running of defendant's train and that therefore the defendant is presumed to have been negligent, and the burden is upon the defendant to show to you by satisfactory evidence that it was not liable, and the same evidence to exonerate itself from blame. If all the evidence leaves its doubtful, or a matter of conjecture as to how the train was being run by the defendant's servants in charge of it, then the defendant has not met the burden, and it is your duty to find for plaintiff full damages for all injury sustained by him, the loss of time by him since his injury, and the loss of time, if any in the future that he will suffer as a result of said injuries, any permanent injury, if

34 any, together with any permanent impairment of the use of his arm and leg, if any, and also any permanent inability to perform physical labor, if any is shown, expense necessarily incurred in an effort to be relieved by medical and surgical aid together with all the facts and circumstances shown in evidence relative to his injury and suffering, as a direct consequence of his injury.

Instruction given.

3527. V. P. Messina vs. I. C. R. R. et al. Filed March 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

(5)

The Court instructs you that after the injury to plaintiff, if you believe he was an employee then temporarily off duty, whether he had permission from the engineer to ride or not, the agents and servants of the defendant's having taken him in charge, owed him the duty to use reasonable diligence to get him to medical and surgical attention, with the means then reasonably at hand, and if you believe from the evidence that they failed in this duty, then you should promptly find a verdict for the plaintiff, assessing such damages as will fully compensate him for the injury which he has suffered because of such failure.

Instruction give-.

3527. V. P. Messina vs. I. C. R. R. et al. Filed March 8th, 1913.

35 #3527.

V. P. MESSINA
vs.
I. C. R. R. et al.

(6)

The court instructs you that the fact, if you believe from the evidence that it is a fact, that plaintiff was leaving Jackson because he got into trouble with some one there does not of itself prevent him from recovering in this case.

Instruction given.

3527. V. P. Messina vs. I. C. R. R. et al. Filed March 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

(7)

The Court instructs the jury that no presumption should be indulged in against the plaintiff by the jury in passing upon this case because it was filed in Holmes County; that the plaintiff has the right to bring his suit in any County in the State where the defendant's line of railway runs and service of process can be had on such defendant.

Instruction given.

#3527. V. P. Messina vs. I. C. R. Co. et al. Filed March 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

35½ *Instructions Given Defendants.*

(3)

3527.

V. P. MESSINA
vs.
I. C. & Y. & M. V. R. R. Co.

The Court instructs the jury that if they find for the defendant the form of their verdict should be; "We the jury find for the defendant."

Filed March 8th, 1913. J. D. Weeks, Clerk, by E. V. Ashley, D. C.

36 *Instructions Given Defendants.*

3527.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

(4)

The Court instructs the jury that there is no complaint in plaintiff's declaration or in this case for damages on account of failure to receive good medical and surgical attention from the time that he came into the charge of defendant's surgeons and that he did receive such good attention is one of the established facts in this case.

3527. V. P. Messina vs. I. C. and Y. & M. V. R. R. Co. Filed March 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

3527.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

(5)

The Court instructs the jury for the defendant that the plaintiff not being on duty at the time he was injured the defendants were not obligated by the rules and regulations of their hospital department to pay any, or all expenses incident to the treatment of said plaintiff for the injuries he received.

Instruction Given.

3527. V. P. Messina vs. I. C. and Y. & M. V. R. R. Co. Filed March 8th, 1913. J. D. Weeks, C. C. E. V. Ashley, D. C.

37

3527.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

The Court instructs the jury that if they believe from the evidence that defendants' employees, as soon as they knew of the plaintiff's injury in the wreck, extended to him reasonably good treatment and assistance; and aided him to get into the baggage car, and gave to him such treatment for his injuries as was then available, and carried him to the hospital with no unreasonable delay and continued such treatment from the time he was taken into the baggage car, and continued the same until after he was taken from the baggage car to the hospital and such treatment while in the hospital, then the jury cannot find verdict for plaintiff on account of any treatment or failure to receive treatment for injuries after he received the same.

Filed March 8th, 1913. J. D. Weeks, Clerk. By E. V. Ashley, D. C.

38

(15)

#3527.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

The Court instructs the jury that if they believe from the evidence that the injury complained of by plaintiff occurred near a culvert over a stream on the top of a ridge, and that defendant had recently before that time put its track in good condition and elevated it, and that the train was in charge of the conductor and the engine of an engineer of long experience in operation of trains over that part of the railroad, and were competent for the discharge of their duties, and that the train was in every respect well equipped for service, and that a water spout and unexpected conditions put the track just before the wreck, in the condition in which it was found by the train; and that the operation of the train was reasonable considering all the circumstances in evidence, and that the wreck was due entirely to such unfor-seen conditions, and that the engineer was looking ahead for the condition of the road, and did all he could to stop the train and avoid the wreck after he saw the track was under water, and was unable to do so, the jury will find for the defendants as to injuries complained of on account of the wreck, itself.

Filed March 8th, 1913. J. D. Weeks, Clerk. By E. V. Ashley, D. C.

39 (1)

The Court instructs the jury for the defendant the Yazoo & Mississippi Valley Railroad Company.

Instruction refused.

Instruction refused Defendants.

3527. V. P. Messina vs. I. C. and Y. & M. V. R. R. Co. Filed March 8th, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

(2)

3527.

V. P. Messina
vs.
Illinois Central Railroad Company and Yazoo & Mississippi Valley Railroad Company.

The Court instructs the jury to find for the defendants, Illinois Central Railroad Company and Yazoo & Mississippi Valley Railroad Company.

Instruction refused.

3527. V. P. Messina vs. I. C. R. R. and Y. & M. V. R. R. Co. Filed March 8th, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

40 3527.

V. P. Messina
vs.
I. C. and Y. & M. V. R. R. Co.

The Court instructs the jury that the defendants at the time of the alleged injury owed the plaintiff no duty except not to recklessly or wilfully or wantonly, or in a grossly negligent manner, injure him; and the jury will find for the defendants, unless they believe from the evidence that plaintiff was injured by the defendants recklessly, or willfully, or wantonly, or in a grossly negligent manner. (But, the Court further instructs the jury, that if you believe from the evidence that the plaintiff was unnecessarily neglected, in view of all the proven surrounding and attendant circumstances, from the time that defendants' employees at and about the wreck knew of his injuries and took charge of him, to the time they placed him in charge of the physicians and surgeons and that plaintiff suffered pain during such time of unnecessary neglect, then the *plaintiff* is liable for such suffering if any shown by the evidence and such neglect proven).

Note.—This instruction not used by the defendant on account of modification by the Court, contained in brackets above.

3527. V. P. Messina vs. I. C. R. R. Co. & Y. & M. V. R. R. Co. Filed March 8th, 1913 J. D. Weeks, C. C., by E. V. Ashley, D. C.

41 (7)

3527.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

The Court instructs the jury that the evidence in this case proves that defendant gave to plaintiff reasonable and proper assistance and medical and surgical attention after his injuries were known to the employees of the defendants; and that no verdict for damages can be given on account of the failure to give such assistance and treatment.

Filed March 8th, 1913. J. D. Weeks, Clerk, by E. V. Ashley, D. C.

42 (8)

3527.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

The Court instructs the jury that the engineer of defendants' train operating the engine thereof at the time of the alleged injury had no authority under the rules of defendants to permit said plaintiff to ride on the train at the place he was in at the time of the alleged injury; and if the jury believe from the evidence that said plaintiff even though an employee of said defendants was guilty of a violation of the rule which prohibited him from riding in the position he was in, and his position on the tender was the direct and proximate cause of the injury he received, and had he been in one of the coaches of defendants instead of that position he would not have been injured, the law is for the defendants and the jury will so find.

Instruction refused.

3527. V. P. Messina vs. I. C. and Y. & M. V. R. R. Co. Filed March 8th, 1913. J. D. Weeks, C. C., by E. V. Ashley, D. C.

43 (9)

3527.

V. P. MESSINA
vs.
I. C. R. R. Co. & M. V. R. R. Co.

The court charges the jury that even though they may believe from the evidence that the plaintiff was an employee of the de-

fendants at the time of his alleged injuries, if they further believe from the evidence, that he was not on duty at the time of the injuries, but, in collusion with others who were non-employees, was beating his way on defendants' train from Canton, Miss. to Memphis, Tenn., by riding on the engine and tender of the train, and was seated as alleged by himself on what is known as the tender, when the engine tender and other parts of the train were derailed and plaintiff was thereby injured, and that his position when the derailment occurred, contributed to his injuries and was the direct and proximate cause of his injuries, and without which he would not have been injured, and that after said derailment and its attendant circumstances, said plaintiff was carried to defendants' hospital and given humane and proper treatment as soon as practicable under all the circumstances, the *lawyers* — for defendants, and the jury will so find.

Instruction refused.

3527. V. P. Messina vs. I. C. & Y. & M. V. R. R. Co. Filed Mar. 8th, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

44 (10)

3527.

V. P. Messina
vs.
I. C. & Y. & M. V. R. R. Co.

The burden is upon the plaintiff to prove to the satisfaction of the jury and by a preponderance of the evidence that the plaintiff was injured recklessly or willfully or wantonly or in a grossly negligent maner by the defendant-; and if the plaintiff has failed in this and the evidence leaves their minds in equal balance as to whether plaintiff was thus injured by the defendants, they will find for said defendants as to the injury caused by the -reck.

Filed Mar. 8th, 1913. J. D. Weeks, C. C. By E. V. Ashley, D. C.

(11)

3527.

V. P. Messina
vs.
I. C. & Y. & M. V. R. R. Co.

The court instructs the jury that if they believe from the evidence that Messina knew that the passengers coaches were the proper places for passengers and if he further knew that this position on the tender was a dangerious place, and if they further believe from the evidence that plaintiff's being on the tender was the proximate cause

of the injury received in the -reck then neither the Illinois Central nor the Y. & M. V. R. R. Co., are responsible in damages to the plaintiff for injuries thus received.

Filed Mar. 8th, 1913. J. D. Weeks, Clerk. By E. V. Ashley, D. C.

45 (14)

3527.

V. P. MESSINA
vs.
I. C. & Y. & M. V. R. R. Co.

The court instructs the jury that they shall find for defendants, as to any damage directly caused by the -reck, unless the preponderance of the evidence in the case proves, that the engineer of the train involved in the -reck, willfuly intended to injury plaintiff or some other person or that the circumstances surrounding said engineer just before or at the time of the -reck was such as to have brought to him or to a reasonable man, situated as he was, the thought of the peril of plaintiff or of those with whom the plaintiff was then associated.

Filed Mar. 8th, 1913. J. D. Weeks, Clerk. By E. V. Ashley, D. C.

45½ (16)

3527.

V. P. MESSINA
vs.
I. C. & Y. & M. V. R. R. Co.

The court instructs the jury that any person who rides on an engine, tender, car or train of any railroad company, without authority or permission of the proper officers or employees of the company, id guilty of a violation of criminal law.

Filed Mar. 8th, 1913. J. D. Weeks, Clerk. By E. V. Ashley, D. C.

(17)

3527.

V. P. MESSINA
vs.
I. C. & Y. & M. V. R. R. Co.

The court instructs the jury that if V. P. Messina was engaged in the commission of a crime at the time of receiving the injury complained of, and in consequence of his commission of such crime, *and* received it without any purpose or design of the employees of defendants or either of them, to inflict such injury on him, then the jury cannot return any verdict against the defendants of either of them, *or* account of such injury.

Filed Mar. 8th, 1913. J. D. Weeks, Clerk. By E. V. Ashley, D. C.

46 Minutes of Circuit Court, Holmes County, Mississippi, Mar. 7th, 1913, February Term, 1913.

3527.

V. P. MESSINA
vs.
Y. & M. V. R. R. Co. & I. C. R. R. Co.

This day this cause came on to be heard, both the plaintiff and defendant- appearing in person and represented by counsel, and issue being joined, it is considered by the court that a jury come to try this cause when came a jury of twelve good and lawful men, to-wit: N. H. McPherson and eleven others, who being legally sworn to well and truly try the issue joined between the plaintiff and defendant and a true verdict give according to the evidence and the law, and who having heard all the evidence and argument of the counsel for both sides, retired to their room having the instructions of the court, for their deliberations, and to consider of their verdict; and presently returned into open court the following verdict: "We the jury find for the plaintiff and assews his damages at Ten Thousand $10,000.00) Dollars; It is accordingly considered by the court, that the said plaintiff do have and recover of and from the defendants, Illinois Central Railroad Company & The Yazoo & Mississippi Valley Railroad Company the said sum of Ten Thousand Dollars, and all costs in this behalf expended, for which — execution issue.

"We the jury find for the plaintiff and assess his damages at the sum of Ten Thousand Dollars ($10,000.00)."

47 3527.

V. P. MESSINA
vs.
ILLINOIS CENTRAL R. R. Co. et al.

Now come the defendants, by their attorney, and moves the court to set aside the verdict and judgment rendered thereon in the above styled cause and to grant a new trial thereof, and assigns the following causes:

(1) The court erred in overruling defendants' motion to exclude the evidence at the conclusion — plaintiff's evidence and to grant peremptory instruction thereon.

(2) The court erred in excluding the evidence offered by plaintiff by Dr. T. R. Trotter in relation to the treatment and statements of plaintiff, as shown by the bill of exception-.

(3) The court erred in refusing to admit the testimony of Dr. J. A. Barksdale in regard to statements of plaintiff and the treatment of plaintiff after the same had been testified to by plaintiff as shown by the bill of exceptions.

(4) The coirt erred in excluding the evidence offered by Dr. Baskerville in regard to treatment of plaintiff as shown by bill of exceptions.

(5) The court erred in excluding testimony offered by defendants, and objected to by plaintiffs shown by various exceptions in stenogarpher's notes now offered to the court.

(6) The coirt erred in admitting evidence offered by plaintiff and objected to by defendants as shown by exceptions in stenographer's notes offered to the court to be read.

(7) The ocurt erred in granting each of the instructions given to plaintiff, numbers 1, 2, 3, 4, 5, 6, and 7.

48 (8) The court erred in refusing each of the instructions asked by the defendant- and refused by the Court, numbers 1, 2, 7, 8, 9, 10, 11, 14, and 17.

(9) The Court erred in modifying the 6th instruction asked by defendants and withdrawn after being modified. Said instructions being modified by adding after the words, "negligent manner" the words "But the Court further instructs the jury that if you believe from the evidence that the plaintiff was unnecessarily neglected in view of all the proven and surrounding and attendant circumstances from the time that defendants' employees at and about the wreck knew of his injuries and took charge of him to the time they placed him in charge of the physicians and surgeons and the plaintiff suffered pain *doing* such time of unnecessary neglect than the defendants are liable for such suffering if any shown by the evidence and such neglect proven.

(10) The verdict was contrary to the law and the evidence and for other causes to be assigned on the hearing of the motion for new trial.

(11) The Court erred in permitting one of the attorneys for the plaintiff, J. F. Barbour, to comment on the testimony of the witness

Wm. Wood, and state that said Woods had testified that he would have taken plaintiff or one of his associates in the car as shown by special bill of exceptions taken by the stenographer.

(12) The Court erred in permitting one of the attorneys of plaintiff, J. F. Barbour, to state that the fees collected from *its* employees were about $600,000.00 as hospital fees to be used to indemnify stockholders against any loss on account of this verdict, as shown by special bill of exceptions, presented on the hearing of this motion.

NOEL, BOOTHE & PEPPER,
Atty's for Defendants.

49 Copy handed to J. F. Barbour, Att'y for Plaintiff 3/8/13.

NOEL, BOOTHE & PEPPER.

Filed 3/8/13. J. D. Weeks, Clerk, by E. V. Ashley, D. C.

50 In Circuit Court of Holmes County, Mississippi.

#2537.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

Be it remembered at the above term of Circuit Court held at Lexington in the County of Holmes, in State of Mississippi, on the 8th day of March, 1913, the Honorable Monroe McClurg, Judge of the Circuit Court, presiding, the above entitled cause coming on to be tried the following proceedings were had, namely:

On the argument of this cause to the jury, J. F. Barbour of counsel for plaintiff, in his closing argument, made the following statement: What did Will Woods tell you? Will Woods said when he went and saw this man laying there, he said "What are you riding up here for? If you had asked me I would have let you ride." The defendants' attorney objected to the statement, saying that there is no evidence to that effect and asked the ruling of the Court, which not being given they excepted.

Mr. Barbour continuing said, "I state to the jury upon my solemn work as a lawyer that he testified to that. He used this language, "I told him what are you riding up there for? I would have carried you." He knowingly violate- the rules of the Company. Who will be a party to a man stealing a ride is merely in the sight of God just as guilty as the man who they say was stealing a ride." To this statement of counsel attorneys for defendant then and there excepted.

Mr. Barbour continuing his speech, said further, "Gentlemen of the jury in my brief practice as a lawyer I have yet to inject into a case a nationality of a boy. If he is a dago, would you deny him justice, if he was a negro wouldn't you give him a fair deal?

51 And so help me God if I ever become the Governor of the great State of Mississippi after I retire from office I will never inject such matter as this into a trial."

(To the above remarks the defendants objected, on the ground that neither the evidence or the remarks of either of counsel in argument of case contains a work in reference to the nationality of plaintiff. The Court said, "Stay in the record." Attorneys for plaintiff, J. F. Barbour, further continuing his speech said, "Now as to the measure of damages, all that we ask is justice. The defendant in this case collects from every employee from the highest to the lowest, fifty cents a month, 100,000 employees, $50,000 a month, $600,000 a year paid to the Company." (Attorneys for defendants objected to the remark because the evidence showed that the railroads did not get any part of the money thus paid by employees.)

And Mr. Barbour continuing said, "I am answering the argument of Governor Noel that you are penalizing the stockholders and I certainly will not do so, because the funds that are raised in this way are to meet the hospital fees. Look at the rules when you go out showing the stockholders are not being penalized, if you think $25,000 is too much, give him $10,000 in awarding damages. If you give him too little he must accept it. He can't complain, and remember when you retire, the broken limbs, the bruised arm, the maimed body, he must carry through the remainder of his life, and in connection with that remember the $600,000 that is paid annually." (These remarks were objected to by attorneys for defendants on the ground that they were unfair and not sustained by the record, an exception was taken to the action of the Court in

52 not excluding. The Court said to the jury you are to be governed in this case by the law and the evidence and not by remarks of counsel. Take the instructions and retire and make up your verdict.

The remarks objected to as above were made to the jury in the closing argument and exceptions was taken and objection made at the time, and to the rulings of the court as above given, the defendants by their attorneys then and there excepted.

Inasmuch as the proceedings, evidence, objections, instructions, rulings and exceptions contained in the foregoing bill do not appear on record in this cause, I, Monroe McClurg, Judge of said Court, who presided at the trial of said cause have settled and signed said bill of exceptions and ordered that the same be made a part of the record in this cause, this 20th day of March A. D. 1913.

MONROE McCLURG,
Judge of the Circuit Court.

53 Minutes of the Circuit Court, Holmes County, Mississippi, March 8th, 1913, February Term, 1913.

3527.

V. P. MESSINA
vs.
I. C. R. R. Co. et al.

This day came the parties by their attorneys, and by mutual agreement the Court took under advisement the motion for a new

trial in the above styled cause, judgment to be rendered thereon, by mutual agreement, during the criminal part of the term of court, as of this date.

54 Minutes of the Circuit Court, Holmes County, Mississippi, February Term, 1913, March 21st, 1913.

3527.

V. P. MESSINA
vs.
I. C. R. R. Co. & Y. & M. V. R. R. Co.

This date came on for hearing the motion of the defendants to set aside the verdict of the jury and the judgment of the Court and to grant a new trial to defendants upon the grounds stated in the motion on file: And the Court having made an order during the Civil Term of the Court, to hear said motion during the Criminal Term, and now heard said motion pursuant to said order and considered the same: It is considered by the Court and so adjudged that same motion be and is hereby overruled, to which action of the Court defendants, then and there excepted, this March 21st, 1913.

54½ March 22, 1913.

Messrs. H. B. Levy and B. C. Trigg, Official Stenographers.

DEAR SIRS: We the attorneys for the defendants in the case of V. P. Messina vs. Illinois Central Railroad Company and Yazoo and Mississippi Valley Railroad Company, No. 3527, tried at the February Term of the Circuit Court of Holmes County, Mississippi, desire to appeal same to the Supreme Court, and therefore respectfully request that a copy of the stenographic notes made at the trial thereof be filed by you pursuant to the provision of Chapter 111, Page 93, Acts of 1910. Please file same at once.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

The above is a true copy of the notice handed to Mr. H. B. Levy personally, and mailed to Mr. B. C. Trigg, Greenville, Miss., postage paid.

J. B. BOOTHE,
Of Counsel.

Filed March 22, 1913. J. D. Weeks, Clerk. By E. V. Ashley, D. C.

55 In the Circuit Court of Holmes County, Mississippi.

3527.

V. P. MESSINA
vs.
I. C. and Y. & M. V. R. R. Co.

Barbour & Burch, Hill & McBee, Attorneys for Plaintiff.
Noel, Boothe & Pepper, Attorneys for Defendants.

Evidence taken in the above case to-wit:
Filed 7/9/13.

J. D. WEEKS, *Clerk.*

56 Juror Ben Stigler, being called counsel for the plaintiff moved the Court to exclude all of the jury except Mr. Stigler, in order that Mr. Sti*h*ler might be examined relative to his qualifications in the absence of the other jurors ten of whom had been accepted by both sides, for the reason that the questions asked Mr. Stigler might be prejudicial to the cause of the plaintiff.

Counsel for the defendant- objected to the exclusion of the eleven jurors from the room while the twel-th juror Mr. Ben Stigler is being examined as to his qualifications, as the examination of Mr. Stigler as to his qualifications should be in the regular order, and in the presence of his fellow jurors.

By the Court: The Court accepts the statement of Plaintiff's counsel that they have good reasons for asking this unusual action on the part of the Court and sustains the motion.

Attorneys for defendant then and there excepted to the ruling of the Court.

Juror BEN STIGLER, being duly sworn testified as follows:

By Mr. McBee:

Q. Now M. Sti*h*ler, do you remember one day last week you had a conversation with me near Beall's store and asked me how many cases I had against the railroad to be tried this term of Court, and you asked me what I thought of a lot of bums and hobos suing the railroad who had been stealing a ride on the train, and you said don't you know we will never give a verdict to a lot of bums for stealing a ride, don't you remember that?

A. No sir.

Q. You remember talking to me about the number of cases I had at this term of court?

A. No sir, I think you have got me mixed up with someone else.

57 Q. Do you remember in the same conversation my talking to you about some plumbing, and I asked you what the plumbing in my house ought to cost?

A. Yes sir, I remember talking to you about the plumbing. I remember telling you what it should cost but if we mentioned railroad cases, I don't remember anything about it. I remember telling you it would cost about $250.00.

Q. That's the plumbing?

A. Yes sir.

Q. You don't remember asking me about the railroad cases?

A. No sir, I do not.

Q. You don't deny saying it do you?

A. I don't know if I said anything about railroad cases. I don't remember that.

Q. Did you know anything about this man?

A. No sir.

Q. Had you ever heard of this case?

A. I don't know.

Q. About bums beating their way?

A. No sir.

Q. You don't know anything about this case?

A. No sir.

R. C. McBEE, a witness in the above inquiry being sworn deposed and testified as follows:

Q. Mr. McBee you are one of the attorneys assisting in this case for the plaintiff?

A. Yes sir.

Q. Do you know this juror Mr. Stigler?

A. Yes sir.

Q. Did you have any conversation with him in Lexington on the Square here near Lipsey's store relative to the case in which
58 he is offered as a juror?

A. Yes sir.

Q. What was it?

A. During the last week I meet Mr. Stigler, and he mentioned some case I had against the railroad company, and asked me if I had many cases in this Court, and mentioned the fact there were some cases pending, but did not call names nor when they were to be tried, but said some bums were suing the railroad company and of course we can't let them have anything. There were other things we were talking about. I asked him about the cost of some plumbing in my house. He was a plumber and that was the reason I was asking him about it.

By Mr. Noel:

Q. He asked you how many cases you had?

A. Yes sir, he asked how many cases I had at this term of court.

Q. You did not mention any of the facts in connection with this case?

A. He just said some bums were suing the railroad for stealing a ride and of course we can't let them have anything.

By Juror Stigler:

Q. What other cases did we discuss?
A. None, except you mentioned the fact that I had, had some against the company.
Q. What cases?
A. You did not call any cases by name.

The Plaintiff challenges the juror for cause.
The challenge for cause was sustained to which action of the Court the defendant then and there excepted.
The defendant desires to give notice to the plaintiff and his counsel that unless the plaintiff is put on the stand first as a witness, that they will object to his testifying, as *to* the witnesses on both sides are now under the rule.
In order that we may keep ourselves in the proper — before the Court, we do not say that we will put Mr. Messina on the
59 stand first. We reserve the right to put Mr. Messina on the stand, whenever we think proper to do so.
The plaintiff retired from the hearing of the Court.

Dr. B. A. SHEPHERD a witness for plaintiff being duly sworn deposed and testified as follows:

Q. Dr. you are a pract-ing physician in Lexington?
A. Yes sir.
Q. How long have you practiced here?
A. Since 1889.
Q. You are a regular graduate physician?
A. Yes sir.
Q. Are you connected with the I. C. and Y. & M. V. R. R. Co.'s surgical department at Lexington?
A. Yes sir.
Q. What way?
A. District surgeon.
Q. What do you mean by that?
A. Looking after the sick, attending those who are hurt and anything of that kind.
Q. Are you in the employ of the I. C. R. R. Co.?
A. Yes sir.
Q. Have those Company's the I. C. and Y. & M. V. what is known as a hospital department?
A. Yes sir.
Q. Have they certain rules governing that department?
A. Yes sir.
Q. I hand you a book and will ask you if that -s a correct copy of the rules of the I. C. and Y. & M. V. Railway Company's hospital department under which its employees work?
A. Yes sir.

Plaintiff introduces this book as Exhibit "A" to this witnesses testimony.

The defendant objects to the introduction of this evidence,
60 for the reason that the plaintiff in this case was not an employee of the I. C. Railway Company at the time of his injury, but had abandoned his employment.)

Overruled. Exception taken.

(Plaintiff's counsel asked permission to read certain parts that are relevant to the jury.)

Counsel here read certain parts to the jury.

W. R. HOSFORD, a witness for the plaintiff, being duly sworn deposed and testified as follows:

Q. Mr. Hosford where do you live?
A. About three miles south of Winona.
Q. In Montgomery County?
A. Yes sir.
Q. State of Mississippi?
A. Yes sir.
Q. How long have you lived there?
A. 18 months.
Q. Do you, live near the line of the I. C. Railway Company?
A. Yes sir.
Q. How far is your residence from the I. C. Railway tracks?
A. About a quarter or a half mile.
Q. Are you employed by the railroad company?
A. No sir.
Q. Are you related to the plaintiff in any way?
A. No sir.
Q. Have you a personal acquaintance with him?
A. No sir.
Q. I will ask you Mr. Hosford to state to the jury, if you recall the time when there was a wreck of their train on the morning of July 18th?
A. Yes sir.
Q. Where were you?
A. I was at home.
61 Q. Was it day time or night?
A. It was at night.
Q. Mr. Hosford state to the jury what were the conditions of the weather on that night?
A. It was on- of the hardest rains I ever saw.
Q. With reference to lightening, thunder, and clouds?
A. It was not a severe electrical storm, just a hard rain. There was some thunder and lightening, but not a great deal.
Q. Could you day whether it was an unusual rain or just a Summer rain?
A. It was an unusual rain.
Q. What was the result of that rain with reference to the raidway company's tracks as observed by you, did it have the appearance of an overflow?

A. Where the wreck occurred it had the appearance of an overflow.

Q. When did you get to the wreck?

A. About six o'clock in the morning.

Q. Was it daylight?

A. It was just daylight when I got there. The first thing I saw was the wreck down there.

Q. State whether or not there was a trestle or railway bridge at or near the point where it occurred?

A. Yes sir, there was a small one there.

Q. About what length of trestle was it?

A. About thirty or thirty-five feet long.

Q. Where the wreck happened? Was it North or South of this trestle?

A. It was South.

Q. In what direction does the road run there?

A. North and South.

Q. Tell the jury what you saw in reference to wrecked cars or anything?

62 A. I went to the railroad track and I come a little south of where it occurred, and as I approached the back of the train there was several wheels of- the track and I went to the front end of the train, and there was three cars off the track and the engine was lying over in the ditch on the west side of the track.

Q. Mr. Hosford what cars were off the track there?

A. The mail car, two baggage cars and the express car.

Q. They were off the track?

A. Yes sir, and my recollection is the forward truck of the combination car was off the track.

Q. How many cars does that make off the track?

A. It makes four cars.

Q. The engine was in what direction?

A. Turned over in a ditch.

Q. Were any of these cars standing upright?

A. The mail car was careened on the side, so you could stand on the side of the car more comfortably than the floor.

Q. This train that was wrecked what direction was it going in?

A. It was a north bound train.

Q. That is known as #2 is it?

A. Yes sir.

Q. How long was this bridge?

A. It was about 30 feet long.

Q. What was the condition of that track as to whether it was straight or curved?

A. There is a curve there two or three hundred yards south.

Q. Have you made any observations there since the wreck, so you can tell the jury at what point after you get on the curve the track becomes straight?

A. I went over it with the Section foreman. We measured it a distance of 150 yards from the trestle back south and it was possibly

two hundred and fifty or three hundred yards to the point of the curve.

63 Q. Two hundred and fifty or three hundred yards of straight track?

A. Yes sir.

Q. Where the wreck was the engine was near the trestle?

A. Right at it.

Q. Where was the wreck train with reference to this trestle?

A. It was south of it.

Q. Train going in what direction?

A. North.

Q. Did you notice anything there to indicate how far the engine run after getting off the track?

A. The track had washed out 100 yards south of the trestle, but I don't believe the engine left the rail until it covered half the track.

Q. Could you tell at what point any of the cars left the track from the torn up condition of the track, can you tell how far the engine ran from where the trouble first started?

A. They had moved about a 100 yards.

Q. I will ask you what was the appearance there from the way the engine lay and the torn up condition of the track, as to whether the locomotive of the train was running slow?

The defendant objects to this question because it is an opinion and not the facts.

Question withdrawn.

Q. Mr. Hosford, state what if anything you saw there that would indicate from the conditions as to whether the train was going fast or slow.

The defendant objects, because it is a mere opinion and not his own knowledge as to the speed of the train.

Overruled. Exception taken.

A. It had the appearance that the train had enough speed to carry it a hundred yards after hitting a bad track.

Q. How could you tell that?

A. From the condition of the track for that distance.

64 Q. Tell the jury what the condition was?

A. It had been washed out for about a hundred yards south and the track had been torn up and what was not was out of line considerably.

Q. When you got there the next morning about six o'clock, state whether or not there was any water over the track?

A. No sir.

Q. State what you saw in the way of signs as to whether the water had been running over the track.

A. The condition of the gravel being washed out and there was water in the mail car.

Q. Could you tell from that how deep the water had run over the rails where the wreck occurred?

A. The trucks of the mail car were off and it was lying on its side, the water must have been deep at that point.

Q. What in reference to water in the car?

A. Water had run through the door of the mail car.

Q. What were the conditions of the rails there with reference to being bent?

A. They were bent but I could not say how badly.

Q. What in reference to the cross ties?

A. Some of the cross ties were broken.

Q. Do you know how long it rained?

A. It rained all that night.

Q. From general conditions there would you say whether it was a local rain or extended any distance, if you know.

A. It seemed to be a general rain.

Q. As to the land there was much of it or little under water?

A. Considerable of the lowland was under water.

Q. On both sides of the railroad?

A. Yes sir, on both sides of the railroad.

Q. Do you know whether or not the railroad company had a telegraph office at Winona?

A. Yes sir.

65 Q. Do you know whether or not it extended as far as Winona?

A. No sir.

Q. Did you go there the next day?

A. No sir.

Q. Can you tell the jury who the section foreman there is?

A. Mr. Blackston.

Q. At that time he was section foreman?

A. Yes sir.

Q. Do you know where he was at that time?

A. No sir, not to my knowledge.

Q. On the occasion of a rain like that, state whether or not, there was a sea of water on both sides of that track, up to the track, and whether it could be seen by the engineer as he came out of the curve for a distance of two or three hundred yards?

The defendant objects because it is a mere matter of opinion as to an imaginary state of affairs.

Overruled. Exception taken.

A. I did not see the water that night, but it could be seen for a distance of two or three hundred yards.

Q. Is that the point where the wreck occurred?

A. Yes sir.

Cross-examination:

Q. Mr. Hosford, I believe you stated that you lived about a quarter of a mile from this wreck.

A. Yes sir.

Q. In going up to where that trestle is, you are going up grade until you pass where the trestle is, and then you go down grade?
A. Yes sir.

By Mr. Barbour:

Q. Mr. Hosford you are acquainted with the stations on that road in a general way?
A. Yes sir.
66 Q. Do you know — Beatty Station on the I. C. R. R. is?
A. Yes sir.
Q. How far is that south of where this wreck occurred?
A. It is eight or ten miles, I don't know exactly.
Q. Do you know where Sawyer station is?
A. Yes sir, it is north of Winona.
Q. Both stations are on the I. C. Railroad?
A. I know that Beatty is a station, but I am not sure that Sawyer is a station.
Q. Where is it?
A. North of Winona.
Q. On the railroad?
A. Yes sir.
Q. Where this wreck occurred was that between Beatty and Sawyer?
A. Yes sir.
Q. About how far north of Beatty was it?
A. About 10 miles north.
Q. About how far south of Sawyer?
A. Six or seven miles.

By Mr. Pepper:

Q. Mr. Hosford, at this point I will ask you to state whether the railroad embankment and right of way is higher than any point north or south of there?
A. Yes sir.
Q. About what would you estimate is the elevation at that point, judging from your experience as a farmer?
A. The difference between that and the lowland is, that water runs swiftly from the top into the bottom land, but I cannot make an estimate — the elevation.
Q. In approaching the place where the wreck occurred you go up grade?
A. Yes sir.
Q. After that you go down grade?
A. Yes sir.
67 Q. Towards west?
A. Yes sir.
Q. How does that little creek cross the track?
A. From West to East.
Q. About how wide is that creek there Mr. Hosford?
A. Nearly 20 feet wide.

Q. The trestle did not wash away?
A. No sir.
Q. Still there?
A. Yes sir.
Q. The water ran down so quickly that next morning the creek was in its banks?
A. Yes sir.
Q. From the top of the track going down to the water how far is it?
A. Three or four feet.
Q. That is not one of the low points in the railroad track?
A. No sir.
Q. Is that not the highest point you know of?
A. Yes, the one or two that I know of.
Q. You don't know what was the condition of the water when the train arrived there that night about 3:22 A. M.
A. No sir.
Q. You don't know whether it was covered with water or not?
A. Only from the indications of water in the car.
Q. I believe that you stated that the rain ceased about three or four o'clock?
A. Yes sir.
Q. This gravel that you state had been washed away from between the cross ties, you don't know whether it washed away before the train got there or not?
A. No sir.
Q. You don't know?
A. No sir.
68 Q. How many coaches south of the mail car that you say were over on the cross ties?
A. Three or four as well as I can remember.
Q. When those cars were put back, the trucks were put back in place and the cars taken on with an engine?
A. I was not there when they did that.
Q. You say that was a regular water spout that night?
A. Yes sir, I would call it that.
Q. The hardest part of it fell west of your house?
A. Yes sir, I don't know conditions east of there, I never go over there, but there was a heavy rain west.
Q. You don't know how far south it extended?
A. No sir I do not.
Q. You could not estimate that?
A. No sir.
Q. Do you know how long Hays creek is?
A. Ten or twelve miles.
Q. I believe you stated there was a curve going north before you reach this trestle, and you could not see up the track until you had cleared that curve?
A. You could not see up the track in the curve, but after you passed the curve you could see straight for a mile or more.
Q. The creek you mention is east of the curve?

A. Hays creek is south of the Curve, north of where the wreck occurred.

Q. You say Hays Creek is south?

A. Yes sir, where it crosses the railroad it is.

Redirect examination:

Q. Mr. Hosford, do you know how long Hays Creek is?

A. It runs from five miles north of Winona into Big Black between Vaiden and West.

Q. State whether or not it affords a natural drainage for a large territory in there?

A. In Montgomery County, we have a drainage district,
69 and I could not say how much land it is the natural drainage for.

Q. What did you say the indications showed the extent of the rain to be?

A. That it was a general rain.

Q. I understood you to say it extended for five miles? Is that correct?

A. I said Hays Creek was five miles north of Winona.

Q. How long was that trestle?

A. I would say about 30 feet.

Q. Do you know whether or not at this point a wreck has occurred before due to rains?

A. Only hearsay.

Q. Is it a matter of common knowledge in that community, that at that point, due to heavy rains that a train was once before wrecked?

Objected to, because it is leading and suggestive and a matter of hearsay and not of his own knowledge.

Sustained.

Exceptions taken.

Q. Mr. Hosford, when you got down to the train from your house on the morning of July 18, 1912, please state if you saw anyone in the baggage car?

A. I did.

Q. In what condition?

A. The person in there seemed to be injured. He was on a cot covered with blankets when I saw him.

Q. Do you remember about what time he was taken to Winona?

A. I saw them take him out about 7.30.

Q. Who by and how was he taken?

A. He was carried on this mattress by parties unknown to me, I don't remember who they were.

Q. What was done with him when they carried him to the relief car?

A. I saw them put him on the relief train that come up there.

70 Q. You did not see any one else that was injured?

A. No sir.

HARRY COLE, a witness on behalf of the plaintiff being duly sworn deposed and testified as follows:

Q. Your name is Harry Cole?
A. Yes sir.
Q. Where do you live?
A. In New Orleans.
Q. How old are you?
A. Twenty-one years.
Q. Where were you born?
A. Here in Lexington.
Q. How long did you live here?
A. My people lived here twenty-five years. I left when I was five years old.
Q. Do your people live in New Orleans?
A. Yes sir.
Q. Have you relatives living here?
A. Yes sir.
Q. Who are they?
A. My Aunt Mrs. Watt McCain, and I am some relation to Governor Noel.
Q. Governor or Mrs. Noel?
A. Mrs. Noel.
Q. You have lived in New Orleans some years?
A. Yes sir.
Q. Did you have any employment there before July 1912?
A. Yes sir.
Q. What was it?
A. Newspaper agent.
Q. What paper?
A. New Orleans Item.
71 Q. Were you on the train the night of the wreck?
A. Yes sir.
Q. Did you receive any injury at that time?
A. Lost my left limb.
Q. Your leg was cut off?
A. Yes sir.
Q. What part of it?
A. Below the knee.
Q. Where were you going Mr. Cole?
A. To Memphis.
Q. When did you leave New Orleans?
A. On Wednesday the 17th day of July.
Q. Up to what time had you employment there before you left there?
A. It was Saturday night.
Q. Before Wednesday the 17th day of July?
A. Yes sir.
Q. Tell the jury how you went out of New Orleans.
A. I got on the train at New Orleans and went to the wreck where we got hurt.
Q. Where was the wreck?

A. Three miles south of Winona, Miss.
Q. Do you know V. P. Messina?
A. Not until I met him in Canton, Miss.
Q. Had you known him before that?
A. No sir.
Q. Were you employed by the railroad company?
A. No sir.
Q. When was the first time you saw the plaintiff here?
A. In Canton, Miss.
Q. Do you know who the engineer was on that train?
A. Yes sir.
Q. Who was he?
A. George Barnett.
72 Q. Is he here now?
A. Yes sir.
Q. Who was with Messina?
A. Zack Boone and Shorty Wharton.
Q. You saw them at Canton?
A. Yes sir.
Q. What if anything did you hear say, or what did you see done at Canton between Messina, Boone and Wharton, or either one in Messina's presence, and the engineer Mr. Barnett.
A. Messina and Boone went over and asked the engineer to carry them a piece up the road, they were trying to get to Memphis, and he said I can't carry you fellows in the cab and told them to jump up on the tender.
Q. Who did he tell to jump up there?
A. All of us.
Q. What became of Messina at the time Mr. Barnett told him to climb up there?
A. He got up.
Q. Do you know what time of night it was?
A. 11:30.
Q. Do you know whether the train was on time or late?
A. The train was late.
Q. Did you stay at Canton or leave there?
A. I left there.
Q. Who did you see on the tender?
A. I saw Boone, Messina, Wharton, and two fellows that were — me, Murphy and Foster.
Q. Where is Foster?
A. New Orleans now.
Q. Has he been here?
A. He was here Monday and left last night.
Q. Do you know why he did not remain here?
A. Work called him back.
73 Q. State whether or not Messina was riding between the engine and baggage car, or whether he was riding on the tank?

Objected to.
Sustained.
Exception taken.

Q. Where was he riding?
A. He was between the car and the engine, on the water tank.
Q. What part of the train is the water tank?
A. It is part of the engine.
Q. Who was operating it?
A. Barnett, I suppose, he was the engineer.
Q. Did anything occur Mr. Cole after you got on the train at Canton before you got to Winona where the wreck occurred. State what happened?
A. We got off at Durant.
Q. What occurred there if anything?
A. We got off on the left hand side and when they started we got back on.
Q. You got off on what side?
A. Left hand side, Messina, Foster, Murphy and myself.
Q. What became of Boone?
A. He got off on the right hand side.
Q. Did you get on before it started?
A. Yes sir.
Q. Do you know where Messina was?
A. He was on the water tender.
Q. Will you tell the jury how the train was running, whether slow or fast?
A. It was going fifty miles an hour.
Q. What did you see at the time the wreck occurred there with reference to the surroundings?
A. Everything was under water for about a quarter of a mile.
Q. What is the fact with reference to the running of the engine with regard to the water?
A. The engine was running after it was wrecked.
Q. While it was on the track?
74 A. Over the cross ties.
Q. Could you tell whether it ran any distance off the rails before turning over?
A. Yes sir, about 100 yards.
Q. What happened?
A. It turned over in a creek.
Q. I will ask you to state even after that engine turned over what was its condition, still running?
A. It was acting like it was running.
Q. After it turned over?
A. Yes sir.
Q. At the very time this train was wrecked, what is the fact as to whether there was or was not water running over the track?
A. There was water running over the track.
Q. When you were injured how were you caught?
A. I was on the back of the water tender, and when the tender went over the mail car piled up on me.
Q. Were you caught between the cars?
A. Yes sir.

Q. What was your condition with reference to any water being where you were?
A. It was up to my waist.
Q. Did you get out or stay there?
A. I could not get out.
Q. Why?
A. My leg was gone.
Q. How deep would you say the water was standing over the track?
A. About a foot and a half to two feet.
Q. What became of you Mr. Cole, did you stay there.
A. I stayed until Zack Boone and Foster pulled me out.
Q. What became of you then?
A. They came down with a hand car and took me away.
Q. By yourself or anyone with you?
A. Murphy was with me.
75 Q. Where was Murphy?
A. On the baggage car.
Q. Was he taken back on the hand car?
A. No sir.
Q. Was there room left on the hand car to carry him?
A. Yes sir.
Q. Who was operating it?
A. Mr. Blackstone.
Q. What was his connection with the railroad company?
A. Section Foreman.

Cross-examination.

By Mr. Pepper:

Q. Mr. Cole, you say you left New Orleans about July 17th.
A. Yes sir.
Q. How did you leave there?
A. We left on the same train No. 2.
Q. Who was with you?
A. Foster and Murphy.
Q. Where were you going?
A. To Memphis, Tennessee.
Q. What part were you riding on?
A. We were on the water tender between that and the mail car.
Q. How did you get in there?
A. We got a negro porter to let us ride, and he said he would take us to Canton.
Q. You were beating your way?
A. No sir.
Q. You did not pay anything?
A. We paid the porter fifty cents apiece.
Q. You knew the conductor was the one to pay?
A. Yes sir.
Q. You have traveled around considerably have you?
A. Yes sir.
Q. That is the first time you were beating your way?

A. Yes sir, and the last time too.

76 Q. Mr. Cole did you ride on top of the coach?

A. No sir.

Q. None of your party?

A. No sir.

Q. Neither Murphy or Foster?

A. No sir.

Q. When you got to Canton where did you go, on which side of the train did you get off.

A. The left hand side.

Q. When you got to Canton you got off on the side opposite the depot?

A. Yes sir.

Q. On the dark side of the train?

A. Yes sir.

Q. You waited there until the train started again did you?

A. No sir, we went to the compress.

Q. You were afraid some officer would catch you?

A. No sir, we walked away.

Q. Before the train started you came back did you?

A. Yes sir.

Q. What part of the train did you get on?

A. Water tender after we spoke to the engineer.

Q. Had you known the engineer?

A. No sir.

Q. Where was he?

A. By the engine.

Q. How many were in your party?

A. Six of us.

Q. One of your party told the engineer he wanted to ride with him to Memphis?

A. Yes sir, he said he wanted him to carry us up the road a piece.

Q. What did he say?

77 A. He said I can't carry you all in the cab, climb up on the water tank.

Q. Instead of getting on top where you would be in full view, you got on between the mail car and the tender of the engine.

A. I did.

Q. How high is the tender?

A. About six feet high.

Q. There was coal piled up on that between you and the engineer?

A. Yes sir.

Q. The other six that were with you, please, state where they wer- located, first came yourself, tell exactly where you stood on the right hand side or left hand side?

A. I was on the left hand side.

Q. Who was on the right?

A. Murphy was on my left hand.

Q. Who on the right?

A. I don't know. There was one there I did not know.

Q. A little heavy set person name Parsons?

A. I have seen him, I don't know his name.
Q. Which side of you was he?
A. He was on the right hand side.
Q. Where was the others?
A. Foster by Parsons, and Messina, Boone and Wharton on the top of the engine.
Q. What positions were they in?
A. I could no- see well enough at night.
Q. You could not see them?
A. They were there.
Q. You could not see them?
A. Not very well at night.
Q. You had not met them?
A. Yes sir.
78 Q. Did you know their names?
A. No sir.
Q. Did you know where they were going?
A. Yes sir, they said they were going to Memphis.
Q. Now with Parsons there were seven of you?
A. Yes sir.
Q. You say the engineer told him he could not carry them in the cab, but to climb up on the tender?
A. Parsons was not there when we were talking.
Q. When did you first see Parsons?
A. In Durant.
Q. We will commence at Canton again Mr. Cole, please state who was to the right of you?
A. Foster was to the right of me.
Q. Who left?
A. Murphy.
Q. Where were the others?
A. On the tender.
Q. Was not Messina on the left hand side?
A. No sir, he was on top.
Q. When you got to Durant where did you go to?
A. We got off on the left hand side.
Q. How far down?
A. At the top where I stood.
Q. Where did you go?
A. Stood around.
Q. How far from the engine?
A. By it.
Q. Who got off on your side?
A. Murphy, Foster and myself.
Q. Who on the other side?
A. Four on the other side.
Q. Three got off on your side and four on the east side?
A. Yes sir.
79 Q. Who was the four on the right hand side?
A. Messina, Wharton, Boone and Parsons.
Q. Who saw Parsons when he got off did you?

A. No sir, I can't say that I did.
Q. Where was Parsons?
A. At the back of the tender.
Q. By you?
A. Yes sir.
Q. Seven of you standing there together?
A. Yes sir.
Q. When did you get back on?
A. When the bell *starting* ringing, just before it started.
Q. What position did you take Mr. Cole when you got back?
A. On the water tank and Messina, Wharton and Boone got on top.
Q. Where did you get?
A. On the back of the tender.
Q. Who to the right and left of you?
A. Foster to the right and Murphy to the left of me.
Q. In going up that night you noticed the water from Big Black at Vaughans?
A. No sir, I did not, I don't know where Big Black is.
Q. You don't know?
A. No sir.
Q. Don't you know it parallels the Illinois Central Railroad to Durant?
A. No sir.
Q. That was not included in the Geography you studied?
A. I did not go to school in Mississippi, I went to school in Louisiana.
Q. You have been here several times since your family left here?
A. Yes sir, years ago.
Q. Did the train make any full stop after leaving Durant until the wreck ?
A. No sir.
80 Q. When the train wrecked there, do you know what became of Parsons, Murphy, Boone, and Messina?
A. I know what became of Messina, he was caught there.
Q. How caught?
A. Behind the ladder.
Q. Was Messina on the back end of the tender and have his arm in the ladder that is on the tender?
A. No sir.
Q. Was he taken from that place?
A. Yes sir.
Q. What was his position if he was not standing there?
A. He was hanging there.
Q. By his arms?
A. Yes sir, he could not touch the floor with his foot.
Q. He was hanging by this ladder and could not reach down?
A. No sir.
Q. In standing there his head would not come up as high as that ladder?
A. No sir.

Q. You don't know how long he was in that position?
A. About 15 minutes I guess.
Q. You said you did not see those boys on top?
A. No sir, but he was on the back of the tender.
Q. Murphy was near you?
A. Yes sir, next to me.
Q. You say the mail car caught your foot and Murphy's foot?
A. Yes sir.
Q. You say they put you on the hand car and took you to the hospital?
A. Yes sir.
Q. Did Mr. Geo. Barnett, the engineer, get off his engine and help put you on the car.
81 A. He was not on his engine.
Q. Where was he?
A. I did not see him.
Q. The only time you saw him was at Cantor?
A. Yes sir.
Q. You went to Mr. Barnett and told him you wanted to go in his engine up the road a piece?
A. Yes sir, Messina and Boone told him.
Q. How close were the balance of you?
A. Standing around three or four feet behind them.
Q. What time of night was that?
A. About 11:30, something like that.
Q. When you were taken up to the hospital did you tell the physician in charge Dr. Baskerville and Doctor Barksdale, and Dr. Trotter, and the head nurse Miss West at the hospital at Winona, that you were beating your way on the train, but that you were not a bum, did you make that statement to them?
A. Yes sir, I told them that.
Q. When you got there you were covered with dirt and cinders and looked like a bum, and you told them you were beating your way, but that you would never beat it again?
A. I may have looked like a bum, but I had good clothes on.
Q. All night you had been sitting by that engine tender outside of the train in the position you have explained to the jury?
A. Yes sir.
Q. Now Mr. Cole, you have a suit here against the railroad on account of the injury you sustained at that time?
A. I don't know whether it has been filed or not.

(At this point counsel for plaintiffs say they will admit that Mr. Cole the witness has a suit against the I. C. Railroad, and Y. & M. V. R. R. Co., on account of injuries sustained at that time.)

82 Q. You are interested in the outcome of this suit?
A. I should judge so.
Q. You and Mr. Messina and Mr. Murphy have been together and talked this over?
A. Not much, we have talked very little about it.
Q. You went out early this morning with your attorney and the other plaintiffs Messina and Murphy and had a talk?

A. Yes sir.
Q. You are very anxious to see Messina recover in his case?
A. If it will benefit me any I am.
Q. To that extent you are?
A. Yes sir.

Redirect examination by Mr. Barbour:

Q. Mr. Pepper asked you if you told the doctor and the nurse, that you were beating your way, but that you were not a bum?
A. Yes sir.
Q. Did you tell them where you lived?
A. Yes sir.
Q. Did anyone have to tell them, that they would pay them before they would operate on you?
A. They telegraphed to my brother-in-law and asked him *of* he would pay them and he said yes.
Q. Where was your leg at that time?
A. At the water tender.

By Mr. Pepper:

Q. Where did you first see the doctor?
A. Up at Winona.
Q. In the hospital were you not?
A. Yes sir.
Q. You had been carried three miles and placed in the hospital before you told anyone who you were?
A. Yes sir.

(In response to the motion of the plaintiff and notice to the defendant to furnish*ed* the original or a copy of the telegraphic
83 communications given to the conductor of the train which was wrecked at Winona, the defendant furnishes the two telegrams which are here offered in evidence by the plaintiff and read to the jury marked Exhibits 1 and 2.

Exhibit Number one was a general bulletin to all trains, dated 7-18, issued at 12:18 A. M. to Durant, Canton and Grenada, and was received at all stations, morning of July 18th and was delivered to the conductor and engineer at Canton at or about 12:18 A. M. July 18th. Exhibit number two was issued date July 18th, addressed to the Conductor and Engineer of train number two involved in this suit and was received at Durant by the Conductor and Engineer of said train at 2:27 in the morning.

Zack Boone, a witness for the plaintiff being duly sworn deposed and testified as follows:

Q. Mr. Boone where do you live?
A. Jackson, Miss.
Q. What business engaged in?
A. I have been with the railroad for about eight years.
Q. On July 18th, what was your business?
A. Railroading.

Q. In what capacity?
A. Switchman.
Q. What road were you working for at that time?
A. I was working for the I. C. Railroad then.
Q. On the day of the wreck of the train at Winona?
A. Yes sir, from the 15th day of June.
Q. Had you railroaded before that?
A. Yes sir.
Q. Where?
A. On the G. & S. I. Railroad.
Q. In what capacity?
A. Car repairing and inspecting and for three years I was switching and braking.

84 Q. You are familiar with operating trains?
A. Yes sir.

Q. Do you know Mr. Messina?
A. Yes sir.
Q. How long have you known him?
A. About three years.
Q. Related to him in any way?
A. No sir not at all.
Q. Mr. Boone were you on the train when this wreck occurred?
A. Yes sir.
Q. Where did you get on?
A. Canton, Mississippi.
Q. Anyone with you?
A. Messina and myself went there together, and after we got there we met Shorty Wharton and was with him all the time.
Q. You say you knew Messina, what was his business?
A. Switchman.
Q. For what Company?
A. The I. C. Railroad Company.
Q. What point?
A. Jackson, Mississippi.
Q. You say that you were at Canton?
A. Yes sir, got on No. 2 there.
Q. Where was Messina going?
A. To Memphis, he said.
Q. The train involved is known as #2, is it?
A. Yes sir.
Q. What time did it leave Canton that night or morning?
A. It was due out of Jackson at 12:15.
Q. In the night you mean?
A. Yes sir.
Q. Was it on time or late that morning?
A. It was not much late.

Q. Who was the engineer in charge of that train to Canton?
85 A. I don't know sir.
Q. Who was in charge from there?

A. Mr. George Barnett.
Q. Did you know him?
A. No sir.

Q. Did you see him at Canton that morning?
A. Yes sir.
Q. What if anything occurred between you and Mr. Barnett before it left Canton?
A. Messina went up to the engineer and asked him about a ride, and he says I can't haul you up here, how many are there of you, and Messina said four or five I think, and he asked Messina what are you doing, what are you riding on, and Messina told him we were switchmen, and he said I can't haul you up here, you can climb on behind there.
Q. What did you do?
A. Got on.
Q. Is the coal near the front or back end of the tender?
A. Front end.
Q. What is the difficulty for a man to ride on top of the tender?
A. It is a good ride al- right.
Q. About what time Mr. Boone did this train leave Canton?
A. I don't know what time, I could not say, I did not have a watch and never asked anyone.
Q. What would you say as to whether it was late or not?
A. It might have been ten or fifteen minutes late.
Q. Going in what direction?
A. North.
Q. State what occurred when you got to Durant?
A. We got off there and there was some coaches about ten feet over there, and we got off of #2 and stayed on the coaches and there was an officer of some kind come around on the other side.
86 Q. Did you know who he was?
A. No sir.
Q. What did he say?
A. He asked where we were going, and we told him to Memphis. He looked at me and says I know you, and I says you ought to I have been in Jackson for the last eight years working for the G. & S. I. Railroad. He says if you are going, you had better go and we got out. We told him the engineer knew we were riding there.
Q. What did you hear between the engineer and fireman or any one else with reference to giving the engineer any notice?
A. Well, when we started to get on the engine the engineer must have been talking to the fireman, he said he had a message to look out for high water between there and Winona.
Q. Do you know about what time it was you got to Durant?
A. Yes sir.
Q. About how long did the train stay there?
A. Long enough to take water.
Q. The train left Durant and went North?
A. Yes sir.
Q. Where were you and Mr. Messina riding?
A. On the tender.
Q. Tell the jury where you were at the time the wreck occurred?
A. On the tank.
Q. Where was Messina then?
A. He was standing by the ladder on the engine.

Q. On what part of the train?
A. The tank.
Q. You say you have had some experience in railroading?
A. Yes sir.
Q. How fast was that train running?
A. About 55 miles an hour.
Q. Is that fast or slow?
87 A. Slow for that train.
Q. Does it go fast?
A. Yes sir, about 65 miles an hour.
Q. Tell the jury what you saw there with reference to the condition of that track as regards water at the time the wreck occurred?
A. We had run in water, water was running over the cross-ties. There was two or three coaches turned over that night.
Q. Immediately after the wreck did you notice any water running over the track?
A. After daylight it was not, but it did run over for an hour or an hour and a half.
Q. How far did that train run Mr. Boone, in water, as a matter of fact before that engine turned over?
A. About the length of three coaches.
Q. Do you know the length of a coach?
A. No sir, I did not know the length of those coaches.
Q. Give us your judgment about how far that train run?
A. About as far as that gate outside of the courthouse, maybe a little further.
Q. What was the condition of the rails and cross-ties?
A. The rails were all there, but some of the cross-ties had been washed away.
Q. State what was the condition of that engine after it turned over with reference to running?
A. It was running when it turned over.
Q. How do you know?
A. I could hear it.
Q. How could you tell?
A. I knew enough to know it was still working then.
Q. Did you see Messina after the accident?
A. Yes sir.
Q. Explain to the jury what his position was?
A. There was a ladder on the back of the tank about six feet high, and he told me he was fastened there and his leg was cut.
88 Q. How was the water with reference to him?
A. Where the engine had turned over, the water was even with the tank.
Q. How deep was the water?
A. About waist deep.
Q. How was Messina with reference to the water?
A. His feet were in the water?
Q. What was done?
A. He was hollering and wanted some one to get him, and I tried to get a bar off the tank and could not find anthing up there, and two or three went to the coach to see if we could get something to

get him out, and we did find one and was getting him out, and the fireman come around and asked if we needed help, and I told him we did.

Q. Tell the jury what you did with him?

A. We got him out and took him and put him in the baggage car.

Q. Who was helping you at the time you were putting him in there?

A. Another man I don't know his name, the fireman and porter.

Q. Do you know about what time of morning it was Mr. Boone?

A. About 3:30 A. M. I guess.

Q. After Messina was put in this baggage car, what if anything, was done towards helping him there?

A. Some fellow come along, he was a stranger, and got some cloth and wrapped his leg up, and they put some cover over him. I don't know what time it was they come and got him out.

Q. How long did Messina stay there?

A. I don't know exactly, but it was about 9:00 o'clock.

Q. During that time did he get any medical attention?

A. Nothing but some whiskey.

Q. Who gave him the whiskey?

A. He was a passenger.

Q. Do you know what become of Cole and Murphy?

A. I heard they had taken them to Winona.

Q. How far was it from Winona?

A. About two miles and a half.

89 Q. Were any hand cars being operated between Winona and the wreck?

A. Yes, sir.

Q. From the bridge on up?

A. Yes, sir, towards Winona.

Q. Did they have any train running between Winona and the wreck?

A. I don't think they did. I think they put Messina on the train they had there.

Q. While Messina was there what was his condition?

A. His leg was hurt and both arms were hurt.

Q. State whether or not he was suffering?

A. Yes, sir, complaining and begging for some one to do something for him.

Q. Did you hear anything said as to who he was?

A. He told them he was a switchman in Jackson and was working for the Company at that time.

Q. Did he tell what his name was?

A. Yes, sir.

Q. I will ask you whether he did one time, or more than one time?

A. Yes, sir, he told everyone that come along. He would tell every one who he was.

Q. Do you know as a matter of fact, that indications were that he was suffering?

A. He was groaning and praying, and going there all the time, and he must have been suffering.

Q. Do you know what is the rule of the I. C. and Y. & M. V. Company's with reference to its employees as to giving them medical or surgical aid?

A. Yes, sir.

Q. Do the employees pay for that?

A. Yes, sir, they take 50 cents out of your wages.

Q. What is that for?

90 A. Hospital fee.

Q. Do you know of your own knowledge what time he was carried to the hospital at Winona?

A. No, sir, I did not go with him, I staid until the train come up. They had a passenger train about 11:30 and I went on that.

Q. Where was Messina?

A. He was in the hospital.

Q. Mr. Boone, what is the custom of the I. C. Railroad, with reference to giving transportation to its employees, who are on its payroll?

(The defendant objects to what is the custom of the railroad company in reference to giving transportation.)

Withdrawn.

Q. I will ask you what is the fact as to the employment of switchmen in the capacity in which Messina was employed, with reference to furnishing transportation, while they are employed by the Company?

Objected to as suggestive and leading, and because it is governed by the rules of the railroads, and is not a matter of custom.

Sustained. Exception taken.

Q. Does the railroad make any written contract with their switchmen employed like Messina was?

A. You make out an application.

Q. Do they make any written contract with you?

A. No, sir.

Q. This is merely an application, is it?

A. Yes, sir.

Q. Who keeps that application?

A. The Yardmaster.

(The defendant objects to this evidence because it is suggestive.)

Sustained. Exception taken.

91 Cross-examination by Mr. Pepper:

Q. Mr. Boone, where did you get on this train?

A. I got on at Canton.

By Mr. Barbour:

Q. What kind of a train was this through passenger or accommodation?

A. It was a through passenger train.

Q. Was that a regular or special train on the I. C.?
A. It was a regular train.
Q. Carry passenger coaches that night?
A. Yes, sir.

By Mr. Pepper:

Q. Mr. Boone how long have you been employed on the I. C. Railroad?
A. Part of two months.
Q. Prior to that?
A. Yes, sir.
Q. Where were you working?
A. At Jackson.
Q. What time did you leave Jackson?
A. That morning about six o'clock.
Q. You and Mr. Messina left together?
A. Yes, sir.
Q. Mr. Messina, had gotten into trouble in the tender loin district that night had he not?
A. Not that I know of.
Q. He told you about it?
A. He did not tell me why he left Jackson, he just said let's go to Canton.
Q. Did he tell you he was in trouble in Jackson and he had to get out of town?
A. No, sir.
Q. What did he tell you, tell exactly what Mr. Messina told you?
A. He said let's go to Canton, and told me he was going to
92 leave town, that's all he told me.
Q. Did he tell you he had some trouble down there and cut some person?
A. No, sir.
Q. Did he tell you there was some shooting and cutting down there and he had to get out of town?
A. No, sir.
Q. He told you he had, had some trouble?
A. He said he and a woman had some trouble and fell out.
Q. Did they have a difficulty at that house?
A. No, sir, only what I told you.
Q. Don't you know as a matter of fact there was trouble down there and he told you he had gotten into trouble and had to leave?
A. No, sir, I don't.
Q. What time did you leave there about six o'clock?
A. Yes, sir.
Q. In the morning?
A. Yes, sir.
Q. What train?
A. Freight train.
Q. Did you bum your way or not?
A. No, sir, got on top.
Q. Had no transportation did you?

A. No, sir.
Q. You knew you had no right on that train?
A. No, sir, I have broke on trains and hauled people.
Q. Did you pass an examination on the book of rules of the I. C. Railroad?
A. No, sir.
Q. Ever read the rules?
A. No, sir.
Q. You only worked how long?
A. Two months.
Q. Where were you going?
93 A. To Canton.
Q. You and Messina wanted to go to Memphis?
A. Yes, sir.
Q. You said something about a conversation Messina had that night at Canton?
A. Yes, sir.
Q. Where did it take place?
A. At the depot.
Q. Where were you?
A. On the ground.
Q. How close to Messina?
A. As close as you I guess.
Q. Any one else there?
A. Shorty Wharton and two more fellows.
Q. Who were they?
A. Cole and another fellow I forget his name.
Q. Had you seen Cole before that?
A. No, sir,——
Q. You knew Shorty Wharton and Messina?
A. Yes, sir.
Q. You and Messina had been there all day?
A. Yes, sir.
Q. You know Jim Rimmer, don't you a switchman at Canton?
A. I know a fellow by that name.
Q. When you and Messina, got off the freight train between six and seven o'clock, did you and Messina go up to Rimmer, and did Messina tell Rimmer, he had gotten into trouble in Jackson, and had to leave there and wanted to go to New Orleans, but was afraid to go back through Jackson, and was going to Memphis, and wanted Rimmer to get him out, and Rimmer told him he could not do anything for him?
A. I was standing with some one, and they were off thirty or forty yards from me, and I could not hear what was said.
94 Q. When you heard this conversation between Messina and the engineer, state exactly what part of the yard it was, and what the engineer was doing?
A. It was at the depot.
Q. Which side were you on?
A. Right hand side.
Q. Depot side?

A. Yes, sir.
Q. State what was said?
A. He asked him about a ride, and he says I can't haul you in the cab, and he says how many are there, and Messina says two or three, and he says there is a tank back there you can crowd on that.
Q. When did you first see Cole and the other fellows?
A. I suppose Cole and the others was in Canton, they were behind us and close to the tank.
Q. That was all that was said at that time between Messina and the engineer was it?
A. Yes, sir.
Q. That's all that was ever said?
A. Yes, sir.
Q. Now when you got to Durant you and who else got off on the right hand side and went to the coaches?
A. Wharton, Parsons, Messina and myself.
Q. Was any one else up there where you all were, before you left and got off on the right hand side?
A. No, sir, not on that side.
Q. Any one on any side?
A. Two or three fellows on the other si-e?
Q. How long had Parsons been there?
A. He told me he got on at Jackson.
Q. When you first saw him he was at Canton was he?
A. No, sir.
Q. That night?
95 A. He was on the train.
Q. Where was he?
A. On the tank.
Q. When did he first appear there?
A. When we got to Durant. We all got off there.
Q. He was riding there?
A. Yes, sir.
Q. He got on at Canton?
A. I don't know, sir.
Q. He was on when the train got to Durant?
A. Yes, sir.
Q. Who helped you take Messina back to the baggage car there?
A. There was two men and the negro fireman.
Q. Did you go back to see if the other boys were hurt?
A. No, sir, when I got back I met Parsons and he said they had carried the other boys over and put them on a hand car.
Q. When you went away with Messina, some one come and got the other boys and took them off?
A. Yes, sir.
Q. When the relief train came from Winona, then Mr. Messina, was taken up and put on that train and carried to Winona?
A. I don't know, I was not there.
Q. I believe you stated you did not know the other parties; they were strangers, except Short, Messina and Parsons?
A. Yes, sir.

Q. Parsons was working there when you came there?
A. Yes, sir.
Q. You stated that when you all got off this freight train at Canton, that Messina went up and had a talk with Rimmer, but you were not close enough to hear what was said?
A. No, sir, I was not.

96 Redirect examination by Mr. Barbour:

Q. Mr. Boone where did Wharton live?
A. In Jackson.
Q. What was his business at that time?
A. He had been switching, but was not working then.
Q. Had been for the I. C. Railroad Company?
A. Yes sir.
Q. Mr. Boone, did you get hurt in that wreck?
A. Yes sir, got my finger mashed.
Q. Have you brought any suit, or made any claim against the Company?
A. No sir.
Q. Did you sign a release to that Company?
A. Yes sir, that same day.
Q. Did they pay you anything?

Objected to; withdrawn.

Q. You say you received an injury there, did you sign a release to the Company?
A. Yes sir.
Q. Did they pay you anything for the release?

Objected to. Sustained. Exception taken.

V. P. MESSINA, the plaintiff being duly sworn deposed and testified as follows:

Q. Mr. Messina, where do you live?
A. Jackson, Miss.
Q. How long have you lived there?
A. Twenty three years.
Q. Where were you born?
A. At the same place.
Q. Are your parents there?
A. Yes sir.
Q. How old did you say you were?
A. Twenty three years old.

97 Q. Mr. Messina, do you remember the occasion of a wreck near Winona, Mississippi, on the 18th day of July 1912?
A. Yes sir.
Q. What was your business, or occupation, if any, at the time of this wreck, on the 18th day of July 1912?
A. I was switchman for the Illinois Central Railroad Company.
Q. How long had you been in the employ of the I. C. R. R. Co.?

A. Two or three years off and on.
Q. About what were you earning as a switchman?
A. Seventy or eighty dollars a month.
Q. Out of what place were you switching?
A. Jackson, Mississippi.
Q. Since this injury in July have you been able to work?
A. No sir.
Q. Tell the jury how you were injured, what part of your body?
A. This right leg, and left arm, and right arm, and also my left leg was injured.
Q. How was your left arm injured, take off your coat, if you can. Which arm is that?
A. Left arm.
Q. What injury to that arm?
A. There is a compound fracture of the bone.
Q. One or both broken?
A. Both were broken.
Q. Was that arm in that shape before the injury?
A. No sir.
Q. How was it?
A. As good as yours or any one else's.
Q. Hold it out there to the jury?
A. Yes sir, I will.
Q. Have you use of that arm now?
A. No sir, I can't use it.
Q. Can you do any work?
A. No sir.
98 Q. Was your right arm injured?
A. Yes sir.
Q. Have you the full use of that arm?
A. No sir, it is not strong.
Q. This injury happened in July 1912, have you been able to work since then?
A. No sir I have not.
Q. You say your left leg was injured; how was it injured?
A. If I had some dressing up here, I could show the jury. If you will send to the boarding house and get some dressing and a pair of scissors, I will take this off and show it to the jury.

Q. (Counsel here sent for the dressing and scissors and the plaintiff exhibited his limb to the jury.)

Q. Was your *k*eg in that condition before you received the injury?
A. No sir, it was not.
Q. Was it all right?
A. It was sound and good.
Q. How was it injured?
A. It was broken right here and the bone prot-uded out there, and Doctor Crisler says he will have to perform another operation on this leg. They put some plates in there.
Q. Have you any use of that leg since the injury?
A. Just enough to walk on.

Q. Have you been able to perform any work since then?
A. No sir.
Q. Have you suffered any pain since the injury?
A. Yes sir, I would not go through it again for the whole I. C. Railroad Company. I would rather be killed.
Q. This happened on the 18th day of July 1912?
A. Yes sir.
Q. How many operations have been performed on you as a result of that injury?
A. The first operation was to sew up this leg.
99 Q. Where done?
A. At Winona, and the next day they operated on me again for my leg and arm. Setting the bone in my leg and arm, and they put two screws in there, and it ought to have three, and they would not give me anything to relieve my suffering.
Q. How many operations did they perform at Winona?
A. They operated two or three times in one week.
Q. How long were you in the hospital at Winona?
A. Twenty nine days I think.
Q. Were you confined in bed there?
A. Yes sir.
Q. Where did you go from there?
A. Jackson, Mississippi.
Q. Have you been operated on since going there?
A. Yes sir.
Q. Who by?
A. Doctor Crisler.
Q. What part did he operate on?
A. My leg and arm.
Q. What time did this accident happen?
A. Between 3.30 and 4 o'clock in the morning on the 18th day of July 1912.
Q. What was your position if you remember, after the wreck occurred there?
A. I was pinioned to the ladder on the tender.
Q. Who got you out, or did you get yourself loose?
A. I called to Shorty Wharton and never got no answer, and then I called to Zack Boone, and he did not come, and then the negro fireman come around and says what the matter, and I said I am pinioned here and can't get loose, and he went to get a bar and while he was gone Zack came up.
Q. Zack Boone?
A. Yes sir, I told Zack this negro would be back with a crow bar, and to keep it against me to keep me from falling in the water.
100 Q. How deep was the water?
A. I don't know sir.
Q. Were you finally released?
A. Yes sir.
Q. What became of you then?

A. I was taken to th baggage car, and as they went to take me in the door, the Bagga emaster says take that tramping son of a bitch out of here.

Objected to as incompetent, irrelvant, and immaterial.
Overruled. Exceotion taken.

Q. Mr. Messina, who put you in the baggage car?
A. Zack Boone, the negro fireman and a boy out of New Orleans.
Q. Just explain to the jury how they got from where you were to the baggage car?
A. The negro fireman came with a crow bar, while I was talking to Zack, and the negro put the crow bar under my arm and pressed from there, and they would push it to get me loose, I could feel the flesh pulling from my body, and I suffered agonies, but they finally got me loose from the ladder. A. My feet were touching the water while I was hanging to this ladder.
Q. How deep was it there?
A. I don't know exactly how deep it was.
Q. In that way they got you out?
A. Yes sir.
Q. Was any one in the employ of the Railroad in the door of the baggage car?
A. The baggagemaster was there.
Q. Were you wet or dry at that time?
A. I was wet.
Q. Were you suffering any?
A. Yes sir, I was.

101 Q. When you were carried into the baggage car, what if anything, was said as to who you were, whether you were in the employ of the Company, or what was said by the baggagemaster there?

The defendant objects to any statement made by the baggagemaster, because he is not such an employee of the company that would bind the Company to any declaration made.
Overruled. Exception taken.

A. After I got on the inside of the car this fellow cursed me. When we started in the door he says take that tramping son of a bitch away from here.
Q. Where were you when he said that?
A. I was on the outside then.
Q. Where were they carrying you then?
A. In the baggage car.
Q. Who was in the car?
A. The baggagemaster.
Q. What connection did he have with the company?
A. I did not know then, he was one of the train crew.
Q. Was that the car he had charge of?
A. Yes sir.
Q. How long were you there from the time of the wreck at 3.30 A. M. until they carried you to Winona?

A. They carried me to Winona at 10.30 A. M.
Q. Did you suffer any then?
A. Yes sir.
Q. To what extent?
A. Severe pain. I could not express it in words to tell the jury what I suffered.
Q. As an indication of your suffering what request did you make of any one there for poison or weapons to destroy your life to end your sufferings?

Objected to as leading Sustained.

Q. What, if anything was said there to you with reference to your suffering?
A. I asked the conductor was there any way to get me to a surgeon and he said no, and there was a farmer standing there and he
102 said I would take you in my wagon, but it is four or five miles that way, and they gave me some whiskey, and I could not hold it down, and I called Zack over and said Zack——

Defendant objects to what he told Zack. Sustained.

Q. Were these railroad men present?
A. The conductor and porter were there.
Q. Do you know who the conductor was?
A. Billie Woods.
Q. You said you laid there till what time?
A. Until 10.30 o'clock.
Q. What became of you then?
A. They carried me to Winona.
Q. About what time did you get to Winona?
A. About 11.30 or 12 o'clock.
Q. I will ask you if you know, if there were any hand cars being operated there that morning?
A. Yes sir.
Q. Do you know when Cole was taken up there?
A. Between 7 and 8 o'clock.
Q. Where were you?
A. In the car.
Q. Who took him up there?
A. The Section Foreman.
Q. What were you doing then when they carried Cole and Murphy up there?
A. I was in the car and begged them to take me up there.
Q. What knowledge if any did the Section Foreman have that you were injured?
A. I don't know sir, but when I heard that Cole and Murphy were going up, I asked them why they did not take me, and they said they did not have room.
Q. Who said that?
A. Bill Woods.
Q. After you got to the hospital you were there how many days?

103 A. Twenty nine days.

Q. What expense did you incur to Doctor Bakerville, as a result of your injury?

A. $836.00.

Q. Have you incurred any hospital or medical bill since you were carried away from Winona? Have you had a doctor to treat you since then?

A. Yes sir.

Q. What were his charges?

A. $536.00, besides that I laid up at home for three months.

Q. After you *keft* Winona and the hospital there where were you carried?

A. To Jackson, Mississippi, and placed in the Jackson Sanitarium.

Q. How long were you there?

A. I was there for about two months.

Q. How long have you been confined to your bed since this injury?

A. Five months.

Q. *Doing* that time state whether you have suffered pain?

A. Yes sir, severe pain.

Q. Mr. Messina, I will ask you what employment did you have at the time you received this injury?

A. I was switchman for the I. C. Railroad Company.

Q. Had you worked during the month of July, 1912?

A. Yes sir, I made two trips on the Gwin turn round.

Q. Up to what time did you work for them before you were injured?

A. About two or three days before I was injured.

Q. At Jackson?

A. Yes sir, I worked the day before I got hurt.

Q. Have you received a check from them covering your time?

A. Yes sir.

Q. Do you know how much it was for?

A. Yes sir, it was for $9.56.

104 Q. Did they take anything out for hospital fee?

A. Yes sir.

Q. Was this check sent to you after the injury?

A. Yes sir.

Q. What is it?

A. Check for time on the railroad.

Q. What month?

A. July, 1912, I was employed as a switchman, but when I was not busy they would put me on the road breaking.

(The check was here offered in evidence and read to the jury.)

Q. How much time was coming to you?

A. $9.56.

Q. What was the fifty cents taken out for?

A. Hospital fee.

Q. What had been their rules with reference to you as to taking anything out of your salary for hospital fee?

A. They always took out fifty cents a month.

Q. Do you know in a general way about the number of employees on the Y. & M. V. and I. C. Railroads that pay this amount?

A. I could not say the exact number, but it is about one hundred thousand employees.

Q. How much per month would that make from their employees?

A. $50,000.00 per month.

The defendant objects to this examination, unless he knows of his own knowledge that all of these employees pay this hospital fee.

Overruled. Exception taken.

Q. Mr. Messina, what connection has Doctors Bakerville and Barksdale, with the I. C. Railroad Company?

A. They are employed by the railroad company.

Q. Did they operate on you before your parants stood for the fee?

105 A. The Claim Agent went to the telephone and told my father I was hurt.

Q. Claim agent of what company?

A. I. C. Railroad Company.

Q. What are the duties of these claim agents when any accident occurres?

A. To go up and get what they can out of any one.

Q. What are the general duties of a claim agent when a wreck occurres?

A. He tries to make a compromise for as small a sum as he can.

Q. Does he look after the injured people for the company?

A. Yes sir.

Q. What did this claim agent do, if you know of your own knowledge in your case?

A. He told me he would go down himself and telephone my father. He said that the Doctors refused to touch me until they got notice that my father would stand for the bill.

The defendant objects to this statement of the witness as to what the claim agent said, as his declaration does not bind the company in this matter.

Counsel — plaintiff, asked that the record show that they did not offer this declaration for any purpose, other than to show the failure of the company to perform the duty under the hospital rule, and the duty of common humanity to an injured man.

The objection is overruled. Exception taken.

Q. What information did the Claim Agent receive as to your being an employee of the company?

A. He asked me was I in the employ of the Company, and I said yes, I was paying hospital fee.

Q. About what time of day did they operate on you?

A. About 1 or 2 o'clock they sewed up my leg.

Q. That day?

A. Yes sir.

Q. What time did the wreck happen?

106 A. Between 3.30 and 4 o'clock.

Q. State whether or not you suffered any pain until you got this relief at the hospital?

A. Yes sir, I cannot tell how I did suffer, a man in my condition could not express it, cannot find words to tell how much he did suffer. I would — have been dead than to have suffered like I did.

Q. What time did you leave Jackson before this injury?

A. Morning of the 17th, of July, 1912.

Q. What time of day?

A. Six o'clock in the morning.

Q. I will ask you were you compelled to leave Jackson for any reason?

A. No sir.

Q. What are the rules of the company with reference to giving employees leave of absence?

A. You have to tell the train master you want to lay off.

Q. What did you do with reference to getting permission?

A. I met Tom Leonard, and told him I wanted to go to Canton with him, and I went and telephoned the I. C. Yards, and I got Merritt over the phone.

Q. Who is Merritt?

A. He works in the office, and I asked for John Harrell.

Q. Who was he?

A. Yard Master.

Q. What did you do?

A. I told Merritt, to tell the Yard Master I was going to Canton.

Objected to. Sustained. Exception taken.

Q. All I want to know is whether you got permission and told them you would not report for work that day?

A. Yes sir, through Merritt, I told them I would not report for work that day.

Objected to what he told Merritt. Sustained. Exception taken.

107 Q. Had you been discharged, severed you- connection, or were you still in the employ of the Company on the 18th day of July, 1912?

A. I was still in the employ of the company on that day.

Q. How did you get to Canton that day?

A. I met Tom Leonard, and rode to the Asylum switch, and met Zack Boone there.

Q. How did you get to Canton?

A. Tom Leonard carried us to Canton.

Q. Is Tom Leonard an engineer?

A. Yes sir.

Q. How long did you stay there?

A. Till 12.55 that morning.

Q. State what, if anything, occurred at Canton with reference to your riding on this particular train number 2?

A. When number 2 came up we decided to go to Memphis, and walked over after they cut the engine off and met three boys from New Orleans, Cole, Murphy and Foster.

Q. Who was the engineer in charge of number 2?

A. George Barnett.

Q. What occurred between you and Mr. Barnett with reference to riding on that train?

A. I asked Geo. Barnett about going to Memphis, I asked for Zack, Shorty Wharton and myself, and he says I cannot carry that bunch, and I says we are railroad boys and would like to go up there, and he says you climb up there, I can't carry you in the cab.

Q. You got on the tender?

A. Yes sir.

Q. Did the engineer know you were there when the accident happened?

A. Yes sir.

Q. What was the opportunity of the engineer to know you were there riding at that time?

108 A. He is supposed to look back.

Q. Could he see you?

A. Yes sir.

Q. Did anything happen at Durant?

A. Yes sir.

Q. Tell the jury what it was?

A. We got off there and was sitting on some dead passenger coaches, and an officer came up there and says where are you going to, and I told him we had permission from the engineer to ride, and he says I ought not to let you go, but as you are railroad boys you can go.

Q. Did you have any money?

A. Yes sir, I had $5.00, but I did not let him know it, when he asked what we had, I told him I had a dime, a cigarette and a match. I did not tell him I had the $5.00, for if he had known that, he would have gotten it.

Q. After the train left Durant did you stop until it got to the wreck?

A. No sir.

Q. Where were you riding at the time the wreck occurred?

A. On the tender of the engine.

Q. Top, or side, or where were you?

A. On the tender.

Q. Mr. Messina, from you- experience in railroading can you tell how fast that train was going at the time of the wreck?

A. It was going about 55 or 60 miles an hour.

Q. Tell the jury what was the condition of the track at the time of the accident with reference to water?

A. I could not say, I did not see it.

Q. You have never seen the wreckage there?

A. No sir.

Q. Mr. Messina, state what is the fact with reference to the railroad furnishing passes to employees in the class you were?

A. They will, but you have to ask 15 or 20 days ahead to get a pass.

109 Q. When you want to ride over the road, do employees get a pass or not?

A. No sir, when his family is going with him he gets a pass, but when he is by himself he does not.

Q. I will ask you whether or not that is the custom to any one kind of employees, or general in reference to passing them?

The defendant objects to evidence as to custom, as this matter is controlled entirely by rules and regulations of the Company, as the witness has admitted, when the pass is applied for it takes a certain number of days to get that pass.

The question is withdrawn for the present until there is some proof of what the counsel says, that there is a regulation in writing with reference to these passes, and plaintiff now calls for that writing.

Defendant says there is no notice served on them previous to this question to produce certain rules and regulations till this moment, and the notice is not in writing, and we have not now an opportunity to compny with the request.

Plaintiff says this is a matter purely within the knowledge of the defendant, and that if it does not produce the writing, we ask permission to show by secondary evidence what is the rule of the company.

The Objection is overruled. Exception taken.

A. It is general in reference to passes. When we go by ourselves we never ask for a pass.

Q. What was the custom if you know practiced by employees of the Company in reference to riding without paying their fare or obtaining a pass?

The defendant objects to this question as leading, suggestive, and practically putting the answer in the mouth of the witness, and further that the custom of these employees is not binding on the defendant.

Overruled. Exception taken.

110 A. Just any time you wanted to go any where, all you had to do, was to ask the engineer for a ride, or the conductor or brakeman. I have ridden many a time that way.

Cross-examination by Mr. Pepper:

Q. Mr. Messina, if you had a right to ride why did you not get in the passenger coach with the other passengers?

A. I did not have the right to ride with the conductor, but I got the right with the engineer.

Q. You knew the engineer operated the engine, and the conductor collected the fares from passengers?

A. Yes sir, I never saw the engineer collecting fares.

Q. You knew the engineer had nothing to do with the passengers?

A. No sir, I did not know that.

Q. Did you not know, that the engineer had no place for passengers?

A. I knew he did not have a place for passengers on his engine, but employees like I was generally ride there, whenever they would ask the engineer and get his permission.

Q. Where?

A. On the engine.

Q. Did you know there was a rule against any one riding on the engine?

A. No sir.

Q. Except the engineer and fireman, and the engineer if caught hauling any one except his fireman and himself would lose his job unless he had permission from the superintendent?

A. No sir.

Q. You have been examined as to the rules?

A. No sir.

Q. Did you say you were familiar with the rules?

A. I said with some of them.

Q. If you failed to live up to the rules you could not keep your job?

111 A. No sir.

Q. Don't you know there is a rule *as* an employ- of the road, shall not leave his work, or place where he can be found without permission of his superior officer?

A. Yes sir, but I had laid off for fifteen days, and only made these two trips on the Gwin Branch.

Q. You are not then in the service of the company?

A. Yes sir I was.

Q. Did you say you had laid off?

A. Yes sir, but I was in the employ of the company.

Q. After you lay off don't you have to notify them, you are ready to go to work again?

A. No sir, the call boy, called me and asked me to go on this run. After I had made this trip I had reported for work. I made these two trips, and in the mean time the regular man showed up for his place, and I rang up and told Harrell I would not be there.

Q. Mr. Messina, as a matter of fact since the last pay day, you had only made time enough to make $9.56 is that correct?

A. Yes sir, I had laid off on the first of the month.

Q. What month did you lay off in?

A. It was in July.

Q. Now the night or morning you left Jackson, you left early in the morning?

A. Yes sir.

Q. Caught a freight train?

A. Yes sir.

Q. Did you get on the freight cars?

A. No sir, I got on the engine.

Q. Where did you ride?

A. In the engine.

Q. Did you get off three or four cars back from the engine?

A. No sir, I did not.

112 Q. You got off down in the yards where Mr. Jim Rimmer was standing?

A. No sir, we had been to the restaurant and walked back.

Q. Did you get off three or four cars' length back and walk up to where Mr. Rimmer was, and have a conversation with him?

A. I got off the engine and walked back to where Mr. Rimmer was and had a conversation with him.

Q. Did you state to him you had gotten into trouble in Jackson about your woman the night before, and had gotten into a shooting or cutting scrape and had to get away, and wanted to go to New Orleans, but was afraid to go through Jackson? And wanted him to help you get out of Canton?

A. I told him some boys had been in a fight. It was Bradley Hardy and Oscar Straus.

Q. Did you further state to him that you were afraid they would pick you up in Canton and not to give you away?

A. No sir.

Q. Did you tell Zack Boone, you had gotten into trouble there with your woman and had to get away?

A. No sir.

Q. You staid down in the yards all day did you?

A. Nor sir, I was at the hotel.

Q. That night you say you come down and caught this train, now tell again exactly who was with you and when you got with them and what you said to the engineer?

A. Zack Boone, myself and Shorty Wharton.

Q. Any one else with you?

A. Cole and Murphy, and I forgot the other boy's name was on the left hand side of the engine.

Q. They were on the West side?

A. Yes sir.

Q. What did you say to the engineer?

A. I asked him about a ride, and he says where to, and I says to Memphis, and he says what is your occupation, and we told
113 him switchman in Jackson, and he says I can't take you in the cab, get on the tender.

Q. That all?

A. No sir.

Q. What else?

A. Zack says to him it looks like it is going to rain, we will get wet, and he says you ride on box cars switching don't you.

Q. That was all that was said by any of you?

A. Yes sir.

Q. You are as well *stai*sfied of that as any thing you have sworn to?

A. Yes sir.

Q. How were you and where were you riding? Place each one where they were?

A. I was riding right at the tender at the ladder on the tender Zack Boone was on the tender, and Shorty Wharton on the coal pile behind the engineer. I don't know where Cole and the other boys were, they were scattered around on the tender.

Q. All of you got on the tender did you?

A. Yes sir, I think so I was looking out for myself.

Q. You don't know?
A. No sir.
Q. You were at the left hand side of the tender were you?
A. Yes sir.
Q. Where the ladder runs up?
A. Yes sir, I was holding on to it like that.
Q. When you got to Durant what did you do?
A. We got off.
Q. Where did you go?
A. Went to some dead coaches.
Q. Where did Cole and Murphy and Foster go?
A. I don't know.
Q. You had not met them then?
A. Yes sir, I met them in Canton?
114 Q. Where did you first meet them in Canton?
A. On the left hnad side of the engine.
Q. Just before No. 2 came in?
A. No sir, it was after that, they had cut the engine off.
Q. Where were they?
A. On the left hand side.
Q. How near the train?
A. About as far as from here to Mr. Burch.
Q. How far is Mr. Burch from you?
A. About ten or twelve feet.
Q. That far the first time you saw them?
A. Yes sir.
Q. Did you get with them then?
A. No sir.
Q. How many cars' length was the engine from you?
A. Right behind us.
Q. Now when you got to Durant and went to the coaches, did you see any one there?
A. Yes sir.
Q. After we got there, a special agent come up, Johnson, I think is his name.
Q. Have *nay* conversation with you?
A. Yes sir, he asked who we were, and we told him who we were, and he asked us where we were going?
Q. Who told him who you were?
A. I did and Zack Boone and Wharton.
Q. Where was Parsons?
A. He was there.
Q. What did Parsons say?
A. He did not say anything at all.
Q. You and Zack and Shorty Wharton did the talking did you?
A. I did for my part.
Q. Did Mr. Johnson tell you all not to get on that train, and just before it started you all ran and jumped on and got on
115 between the mail car and the engine?
A. No sir.
Q. Where were you riding after you left Durant?
A. I got where I was at first.

Q. On the ladder?
A. Yes sir.
Q. Where were the others?
A. They were scattered around there.
Q. Where was Foster, Parsons, Murphy and Cole?
A. I don't know.
Q. You don't know where they were?
A. No sir.
Q. After this wreck up there, you were taken by Zack Boone and the fireman to the baggage car?
A. Yes sir.
Q. Now when Zack Boone and the fireman came to you, where were these other boys?
A. Cole was standing holding to the hand hold on the back of the tender.
Q. You were the first one moved and taken to the baggage car?
A. Yes sir, by Boone and the fireman.
Q. You left Cole right where he was?
A. Yes sir.
Q. None of the others had been moved?
A. I don't know sir.
Q. Did not Mr. Bill Woods the Conductor go to the sleeper and get some blankets and have them brought there?
A. No sir.
Q. Did he bring a doctor?
A. No sir, he did not.
Q. Did this doctor dress your wounds and bind them up and attend you?
A. He said he was a doctor and bound my leg.
116 Q. Did Mr. Woods go through the train looking for a doctor?
A. I don't know sir.
Q. Did he bring him?
A. No sir he did not.
Q. You drank a large quantity of whiskey?
A. No sir, they gave me a little and it would not stay down.
Q. When the train came up there, you were put on the relief train were you?
A. Yes sir.
Q. Did they have a mattress there for you?
A. No sir.
Q. Did they have any blankets?
A. No sir.
Q. What time did they put you on that relief train?
A. It was after 10.30.
Q. Did you leave there at 7.30 and arrive at Winona 8.05?
A. No sir.
Q. You were taken immediately to the hospital?
A. When I got there, but it was between 11.30 and 12 o'clock.
Q. Did Doctor Barksdale come by there and give you some morphine?
A. No sir.

Q. He came up from Vaiden and when he got there he gave you this hyperdermic of morphine, did he not?

A. He came ther- about 11.30.

Q. Did he come to Winona and put — in the hospital in a place prepared for you?

A. No sir, there were four negroes carried me there, and Doctor Barksdale or Baskerville were not there.

Q. Did they not immediately give you medical attention?

A. No sir, they did not.

Q. Did the nurses look after you immediately as soon as you were put in there?

A. They attended to me and taken my clothes off.

117 Q. Were they acting under the instructions of one of these gentlemen?

A. Yes sir.

Q. Did they give you surgical and medical attention during the twenty nine days you were there?

A. They visited me while I was there, after they found out they were going to get paid.

Q. When did you leave, you left over their protest?

A. Yes, sir, I felt I was not getting any better and not getting proper attention and I wanted to go to Doctor Crisler.

Q. In other words while you were there, did you not make a good deal of trouble?

A. No sir, I only called for things to relieve me and could not get none at all.

Q. On account of your conduct while you were there in bed, did they not tell you, you ought not to do what you were doing?

A. No sir, they did not.

Q. You met another doctor there, Doctor Trotter and old gentleman?

A. Yes sir.

Q. Do you remember Miss West a nurse there?

A. Yes sir.

Q. Did you tell Doctor Trotter, Doctor Baskerville or Doctor Barksdale, or Miss West, that you were beating you- way on the train, stealing a ride at the time you were injured?

A. No sir, I did not.

Q. You stated you paid these Doctors $836.00, for medical attention while you were there?

A. I said I paid $200.00 I think.

Q. Did you not state a few moments ago in the presence of this jury that you had paid $836.00 for attention while you were in that hospital?

Plaintiff objects. Ovverruled. Exception taken.

118 A. No sir.

Q. What did you say?

A. I said they wanted to charge $836.00 for 29 days I was there.

Q. As a matter of fact you have not paid these Doctors anything?

A. No sir, but my father has.

Q. What has your father paid them?
A. I don't know sir, but he paid them something.
Q. Will you swear here your father has paid these gentleman anything at all?
A. Yes sir, I know he made one payment to them.
Q. Your father is a man of large means is he?

Objected to as incompetent. Sustained. Exception taken.

Q. How much time did you put in with the Railway Company after that leave of absence?
A. $9.56, worth.
Q. How many days or hours?
A. One of the trips paid me $5.56 and the other one $4.00.
Q. At that time you were running and made a trip in the place of the regular man?
A. Yes sir.
Q. How long has it been since you left the hospital at Winona?
A. It has been about six or seven months.
Q. Have you any objections to having Doctor Trotter, Dr. Baskerville and Dr. Barksdale, examine you to-night, as to your condition?
A. Being railroad surgeons I have.
Q. You object to these gentlemen examining you tonight?
A. Yes sir, but I will take any three surgeons in this town that you might name, not with the railroad and let them examine me.

Defendant gives notice as part of our testimony, we intend to have these three doctors examine the witness in the presence of the jury, and explain what treatment was then given him, and what his physical condition now is. They can have any other physician present at that examination if they desire to.

Doctor J. W. CRISLER, a witness for the plaintiff, being duly sworn deposed and testified as follows:

Q. Doctor your name is J. W. Crisler?
A. Yes sir.
Q. Where do you live?
A. Jackson, Mississippi.
Q. What business are you engaged in?
A. Physician and surgeon.
Q. Are you a graduate of any college or University in Medicine?
A. Yes sir, Jefferson College, Philadelphia, and John- Hopkins University, and I have taken post graduate courses in New York and Chicago.
Q. How long have you been practicing?
A. Fifteen years.
Q. Lived at Jackson that long?
A. Yes sir.
Q. Are you connected with any sanitarium?
A. Yes sir, The Jackson Sanitarium.
Q. Under whose control?
A. It is a stock company, but I am the principal owner.

Q. How long have you been connected with that Sanitarium?
A. Twelve years.
Q. Are you especially prepared in surgery?
A. Yes sir.
Q. Do you know Mr. Messina, the plaintiff in this case?
A. Yes sir.
Q. Do you remember the first time you saw him since the accident?
A. Yes sir.
Q. Where was he?
A. At the Sanitarium.
Q. Were there any evidence- of injury on his body then?
120 A. Yes sir.
Q. What was his condition at that time with reference to injuries on his body?
A. It is a little hard to remember which leg or arm, but I remember his right leg there was injured.
Q. Doctor, you treat a great many patients do you?
A. Yes sir.
Q. It is impossible to remember which is the right and left limb?
A. Yes sir.
Q. If we bring Mr. Messina in would that remind you?
A. Yes sir.

(Counsel for plaintiff asked permission to send for the plaintiff.)
Plaintiff was sent for to show his wounds.

Q. How long did you treat him?
A. He came to me and I had him under observation about a month.
Q. Perform any operations?
A. Yes sir.
Q. How many?
A. I performed several operations.
Q. Doctor this is the man you have reference to?
A. Yes sir.
Q. Will you show the jury his left arm?
A. I would rather have his right leg first.
Q. All right sir, do that. Q. State to the jury what condition you found this leg here, and if you operated on it?
A. The skin was off from here to here. It looked like a place about 12 or 15 inches, all this was off. This was off to here, and the skin was off here. This was a large wound here. That is the leg injury.
Q. Doctor can you tell the jury whether the bone was broken?
A. Yes sir, both bones were broken. I put a plate in
121 here and I kept him in the hospital for a month and then he went home, and he staid there two months I guess. He then came back to the hospital. There is no bone there now, and it will have to be cleaned out. When he came back we took the plate out, and he had no bone there at all. The bones were about this much

gone. He had a paralized hand, and he would have to take hold of his hand to lift it up.

Q. Then you performed how many operations on him?

A. I performed three operations on him.

Q. Doctor, I will ask you whether or not the wounds you found on the man's body when you first saw him, whether or not he was suffering any physical pain?

A. Yes sir, he was.

Q. Does he still suffeer pain from these wounds?

A. I should say this would hurt him all the time.

Q. With reference to that left arm there that was broken, you showed the jury about two inches of the bone was gone?

A. Yes sir.

Q. I will ask you whether or not the injuries to that arm are permanent?

A. Yes sir, he will never have the use of that arm like it was.

Q. You say the right arm was paralyzed?

A. Yes sir.

Q. I will ask you whether or not he will ever have good use of the right arm?

A. He will not have as good an arm as before, but he will have good use of it.

Q. I will ask you whether or not he will have the same use of his leg there?

A. He will never have good use of it.

Q. Doctor did you find anything in this man's condition or his blood that caused this condition?

122 A. No sir.

Q. Nothing to prevent him from getting well?

A. No sir.

Q. Now, Doctor, I put *you to* hypothetically, if he had received injuries as the result of what you saw there, and he was allowed to remain in the water with his clothing wet from half past three to half past ten or eleven o'clock, without any treatment, I will ask you, whether that would have any effect on his getting well any sooner?

A. I should say it would postpone his recovery.

Q. You would say that would postpone his getting well?

A. Yes sir, it would to a certain extent.

Cross-examination by Mr. Noel:

Q. Doctor you knew nothing of the wound other than that you have told the jury there?

A. No sir.

Q. He came to your infirmary for treatment and you gave him good treatment for a month?

A. The first time he was there. He was there twice. The first time I kept his wounds clean and dressed them and grafted skin on them.

Q. Two months intervened before he was there the second time?

A. Yes sir the second time he was there, I grafted some more skin

and took out some bone out of his left arm, and took out dead bones and the plate on the right leg above the ankle.

Q. His right arm is to all practical purposes as good as it was before?

A. It is not as good as it was before, but he has good use of it.

Q. His left leg never was affected was it?

A. I don't recall doing anything to his left leg at all.

Q. The right leg will be a good leg?

A. No sir, he will never have as good use of it as he had before.

123 Q. If it is cleaned out and heals up?

A. He will not have a good leg.

Q. When he was there you had trained nurses attending him, and had all his suffering eased?

A. We had to give him lots of morphine, and kept it up every day.

Q. Doctor, I will put *you to* another hypothetical *g*uestion. If the plaintiff was injured about three or 4 o'clock, and in 20 or 30 minutes, was put into the baggage car on a mattress, and treated by a physician, and made as comfortable as he could be under the circumstances, and by 8.10, carried to the hispital in care of good physicians and trained nurses, what effect would that have had on him, so far as the healing of his wounds are concerned?

A. Immediate treatment of his wounds would be necessary, and they could not give it the proper treatment in the baggage car.

Q. You would not say there was any real impairment, if he had been attended by a surgeon within half an hour and then carried to the infirmary and treated within a few hours?

A. I did not see him within three or four weeks after the time, and I would not like to go on record saying anything previous to the time I saw him. A physician could not do much but ease him.

Q. No man's wounds are ever treated at once are they?

A. They should be treated as soon as possible. The sooner the better for the man.

Q. Would you say that the difference in the time when he was injured, and the time he was carried to the hospital and treated would make any difference?

A. I should think it would. I would want him attended to as soon as possible.

Q. If attended to in three or four hours would you say there would be a delay in recovery?

A. Yes, sir, I think so.

124 Plaintiff rests.

W. R. JOHNSON, a witness on behalf of the defendant being duly sworn deposed and testified as follows:

Q. Your name is W. R. Johnson?

A. Yes, sir.

Q. Where do you live?

A. Durant, Mississippi.

Q. Where were you living last June and July?
A. Durant, Mississippi.
Q. What business were you engaged in?
A. Night watchman for the town of Durant.
Q. Now, along about the night of the 17th of July, or the morning of the 18th, please state whether or not you saw any persons around or near the train known as number 2, going north between two and three o'clock in the morning?
A. Yes, sir.
Q. How many?
A. Four.
Q. On which side of the track and what part?
A. On the east side, the dark side of the train from the depot, and near the depot, near where the train takes water.
Q. How far from the engine when you saw them?
A. From ten to twenty feet.
Q. What doing?
A. When I first saw them, some of them were emerging from the blind.
Q. What do you mean by the blind?
A. That part of the mail car. There is a door in the end of the mail car, they were emerging from that, and when I approached them, I asked them where they were going and where they came from something like that.
Q. What did they say or do?
A. They were dirty and looked pretty tough, and some of
125 them said they were going to Memphis, and some to Chicago.
Q. Do you know whether this man was among them or not?
A. Yes, sir, I remember him as one of the men that was in the crowd.
Q. Was this conversation in his presence?
A. Yes, sir, they told me they were switchmen, some from Jackson, and some from Canton. They said they had lost their jobs and were going to look for work, and they were all in.
Q. What did they mean by all in?
A. Did not have any money to pay their fare, and I told them it was a violation of the law for them to ride that way on the train, and if they were railroad men they should have passes or pay their fare. The Company paid good salaries and if they did not have the money it was their own fault, and one man in the bunch said he lived somewhere up north. That some of his people were sick and he was trying to get home. That he had been working extra at Jackson.

The plaintiff objects to the conversation with another man that does not affect this man.
The defendant submits that the plaintiff himself as a witness brought out all the conversation that occurred in his examination in chief and cross examination, and that we have a right to contradict the testimony that he gave.
The objection is sustained. Exception taken.
We have the same trouble with this witness every time he goes

on the stand. He goes out of his way to give the testimony he seeks to give.

The defendant objects to the statement of the court in the presence of the jury, that they have the same trouble with this witness every time he goes on the stand. That he goes out of his way to give the testimony he seeks to give, and reserves an exception.

Q. Mr. Johnson, what did these parties say, if anything, with reference to whether they had permission to ride on the train?

126 A. There was no conversation to that effect.

Q. State whether or not they stated they had permission to ride on that train?

A. Not to me.

Q. Please state whether or not you gave them permission to ride on that train?

A. I did not, I told them to keep off that train.

Q. What was said by them, if anything, with reference to riding on that train after you told them that?

A. They said they were going to look for jobs, and one was going home, and that was the only way they had to go.

Q. What did you say, if anything, about their getting on the train?

A. I told them not to get back on.

Q. What did they say, if anything?

A. I don't remember any reply, except at first they did insist on going.

Q. Did you see any one on the right hand side?

A. No, sir.

Q. Is that about all that was said?

A. That's all that I recall, as briefly as I know how to state it.

Q. Did you ask this man Messina what he had?

A. I asked the bunch what they had and felt to see if they had a gun.

Q. Did any one have a gun?

A. No, sir.

Q. Did you take anything from them?

A. No, sir.

Q. Did the plaintiff state to you that he had a cigarette, a dime and a match?

A. I do not recall whether that was his statement or not, but it was something to that effect.

127 Q. Now, Mr. Johnson how long have you lived in Durant?

A. Since the first of May, 1911.

Q. Where did you live before that?

A. Jackson, Mississippi.

Q. What did you do there?

A. I was assistant manager for a sewing machine company and filled the office of constable to fill out an unexpired term by appointment from Governor Noel. He appointed me constable of the 5th Supervisors District.

Q. You were under Mr. Japp?

A. No, sir, I worked for him.

Q. What were your duties?
A. Same duties of any other constable.
Q. When you went to Durant you were a peace officer there?
A. Yes, sir.
Q. Your duties about the same only a different territory?
A. Yes, sir.
Q. While you were at Jackson, did the railroad company pay you anything?
A. No, sir.
Q. You looked after that property like any one else's?
A. Yes, sir.
Q. If you had seen anyone robbing cars there you would have arrested them?
A. Yes, sir.
Q. They paid you nothing?
A. No, sir.
Q. You came to Durant and took the position as a peace officer there?
A. Yes, sir.
Q. You protected the property of individuals and the corporations?
A. Yes, sir.
128 Q. Why were they giving you $10.00 a month at Durant?
A. I don't know, sir.
Q. Is it a fact that you were getting $10.00 a month?
A. Yes, sir.
Q. You don't return any favors for it?
A. I look after their property just like I do after the property of any individual.
Q. You regarded it your duty to do that in Jackson as much as in Durant?
A. Yes, sir.
Q. They did not pay you anything at Jackson?
A. No, sir.
Q. Why did they pay you at Durant when they did not at Jackson?
A. I don't know, sir. They pay me $10.00 a month at Durant.
Q. You take that and don't ask any questions about it?
A. Yes, sir.
Q. Who was the first person that told you the railroad was going to give you $10.00 a month for nothing?
A. After I went to Durant, I was advised my predecessor had been getting $10.00 a month. That Mr. Callifer was, and that I would get it.
Q. Now, Mr. Johnson, you say that when these men got off, you don't remember whether they said they had permission to ride or not?
A. They did not say so.
Q. Is it not a fact that you told them not to get on that train, but to wait and catch a freight, that the conductor would take them?

A. I did not tell them they could. I said they might make arrangements.

Q. Do you see conductors pass employees?

A. I have seen conductors on local freights carry men, where they help to handle the freight.

129 Q. Was there a local freight that night?

A. I don't know.

Q. I will ask you if it is not a frequent thing that railroad employees ride with the conductors and work their way through, and did you know that fact, and that's why you told these boys to wait and get on that train?

A. I don't know.

Q. I say admitting that they were employees, does it not often occur that conductors pass employees?

A. I don't know.

Q. Then why did you tell these men to wait and take the local freight?

A. I have said some men ride with local crews and work their way. I have known some to do that. I told these boys if they could ride with the conductor on the inside, that was all right.

Q. Why were you telling them that?

A. Because I thought it was my duty to tell them.

Q. Do you know any law to prevent them riding there if they had permission to ride?

A. No, sir, but they did not say they had permission.

Q. Mr. Pepper asked you if you gave them permission?

A. Yes, sir, but I did not give them permission to ride.

Q. What authority did you have?

A. None.

Q. Are you connected with the company in any way?

A. Only in that way I have stated.

Q. Did you think it was against the rules of the company?

A. It's my impression that it was.

Q. You don't know then?

A. No, sir, not of my own knowledge.

Q. Did you see the engineer that night?

A. Yes, sir, I think I did.

130 Q. Do you recall seeing him that night?

A. I think I did.

Q. You said nothing to him?

A. No, sir, rarely ever spoke to one of the crew.

Redirect examination:

Q. I believe you stated Mr. Johnson, that Mr. Callifer receives $10.00, a month from the railroad, do you know what position he holds there?

Objected to as incompetent, immaterial and irrelevant. Sustained. Exception taken.

By the Court: The court states to the counsel, witness and the jury, that the statement made by the court with reference to the

manner in which this witness delivers his testimony while on the stand, and excepted to by counsel for the defendant, was not intended in any way to criticize the veracity or integrity of the witness, but to hold him within bounds to the delivery of his testimony.

Mr. H. C. RIMMER, a witness for the defendant, being duly sworn deposed and testified as follows:

Q. You- name is H. C. Rimmer?
A. Yes, sir.
Q. Where do you live?
A. Canton, Mississippi.
Q. How long have you lived there?
A. Thirty years.
Q. What business are you engaged in?
A. Yard man for the I. C. Railroad, and have been for twelve years.
Q. What do you call your position?
A. Switchman.
Q. Please state if you were a switchman last June or July?
A. Yes, sir.

131 Q. Do you remember of seeing and having a conversation with Mr. Messina, the plaintiff in this case last July at Canton?
A. Yes sir.
Q. Where was it?
A. In the South Yards.
Q. Please state the circumstances of meeting him and talking with him?
A. I go to work at 7 o'clock in the morning, and my engine was a little late that morning, and about 7.30, I got the engine, and was waiting for a train to come in from the South to go to work. It was a freight train. When the train stopped in the yards they cut the engine off and started to the round house. It was about 15 or 20 cars long, and I saw that fellow over there and another fellow with him. They got off the train about ten cars from the engine, and I spoke to him and asked him what he was doing there. I asked him if he was one of the crew, and he says no. I got in some trouble in Jackson and had to leave there, and I asked him what it was.
Q. What did he say?
A. He said it was in the red light district, that he had gotten in a fuss with his woman and cut her, and had to leave there on short notice, and I asked him where he was going, and he says I don't know, I want to catch a train going back to New Orleans, but I am afraid they will get me going back through Jackson. I think I will go to Memphis. He says what are the chances of getting out of here, and I says I don't know, I don't think anybody will carry you out of here, and I asked him why he did not get a pass, and he said I did not have time, and I believe he asked me about the police there and if I had heard anything about it, and I told him no, and

he said he did not want to stir around for they might get him there.

Q. Did you see him after that?

A. I saw him at the Lunch Counter and there was another fellow with him.

132 Q. They got off there about 7.30 in the morning?

A. Yes sir.

Q. You don't know what became of them?

A. No sir.

Cross-examination:

Q. How long have you been employed there?

A. Twelve years.

Q. They have a large number of employees, switchman, breakman, flagman, conductors, engineers and office force?

A. Yes sir.

Q. Do you know whether the engineer gave this man permission to ride on that train?

A. No sir.

Q. Do you know whether he had any notice that, that track was under water?

A. No sir.

Q. Do you know whether that train was running fifty or sixty miles an hour?

A. No sir.

Dr. T. R. TROTTER, a witness for the defendant being duly sworn deposed and testified as follows:

Q. Where do you live?

A. Winona, Mississippi.

Q. What profession are you engaged in?

A. Physician and surgeon.

Q. How long have you been practicing as a physician and surgeon?

A. 54 years.

Q. From what college did you receive your diploma?

A. University of Tennessee and Tulane.

Q. What connection, Doctor, if any, did you have last July with the I. C. Railroad?

A. Local surgeon.

133 Q. Do you remember the occasion of the wreck and some persons being injured about the 18th day of July?

A. Yes sir.

Q. About what time of day, Doctor?

A. Early in the morning.

Q. What did you do Doctor?

A. I went to the hospital.

Q. When you got there did you see any one?

A. Some boys came in soon after.

Q. Who were they?

A. Mr. Murphy and Mr. Cole.

Q. What was done with them when they were brought there?

A. They were placed in a room, given hyperdermics and their wounds were dressed.

Q. Do you remember Mr. Messina being brought there and what time?

A. I would say between eight and nine o'clock.

Q. How was he brought there?

A. On the train I think.

Q. Did you attend to Mr. Messina?

A. No, only as assistant.

Q. Were you treating him as a physician?

A. No sir, Doctor Baskerville and Barksdale treated him.

Q. You were not there as a physician?

A. I was called in as a physician, but had no connection with the case.

Q. Who were you there treating?

A. I was there as the company's surgeon.

Q. Please state Doctor if you were present and assisted when his wounds were being dressed?

A. Yes sir.

Q. State whether his wounds were properly or improperly treated at that time?

A. They were properly treated.

134 Q. Did you have any conversation with him?

A. Yes sir.

Q. Please state what that conversation was?

—. ——.

By Mr. Barbour:

Q. Were you there assisting the other doctors?

A. Not especially, but I was there.

The counsel for plaintiff objects to any statement made by the plaintiff to Doctor Trotter there, or any information obtained by Doctor Trotter, as a physician in attendance on Messina, for the reason that it is incompetent, because he was a physician who Messina had been carried for assistant-, and was one of the Doctors in charge of Messina. We do not object to the testimony of this gentleman, as to what time this man was carried to the hospital to receive treatment.

Counsel for defendant state that they propose to prove by this surgeon and others, that the allegations of the declaration, that defendant failed to provide proper medical and surgical attention, and that he was given early in the morning about 8 o'clock proper attention and from that time on as long as he would remain at the sanitarium about twenty nine days, and that the surgeons in charge objected to his leaving even then, thinking it would better his condition to remain quiet and under the treatment then being given, and last that the statement of plaintiff to the jury along the line of suffering, and that he was subject to maltreatment by the surgeons in charge of his case at Winona, by putting only two instead of three

screws in his leg, and under the circumstances the physicians are competent to establish the kind of treatment he received.

The plaintiff does not object to any testimony by the physicians or any one else, that this man left there after being there twenty nine days and left without permission.

By the Court: Being called upon by the counsel to indicate the position of the Court in the foregoing statement to the Court,
135 the Court is of the opinion now, that since the plaintiff was taken charge of by the agents of the company at the place of the wreck, and while he was appealing for surgical assistance, was carried by them to this hospital at Winona, and put by the Company in charge of its physicians and surgeons, that under Section 3695 of the Code, all communications made by the plaintiff to either of these physicians and surgeons, who then had charge of him, would be incompetent to be testified to by these physicians and sur-eons, or employees of the hospital who assisted in treating this plaintiff, and the fact that the plaintiff was asked on cross-examination by the defendant's counsel to make a statement with reference to being neglected there, does does not lay a predicate that would make competent the testimony by these physicians and surgeons and employees of the hospital in charge of the plaintiff to rebut such testimony br-ught out on cross-examination. Whether the plaintiff left the hospital under the protest of the Company's physicians and surgeons, was not objected to as the court understands it by the plaintiff's counsel and was admitted by the plaintiff.

The attorneys for the defendant except to the ruilng of the court in this matter as above set forth. They now in the absence of the jury as attorneys for the defendant, as the court does his ruling include evidence that will be offered by defendant's evidence of Doctor Trotter, Dr. Baskerville and Dr. Barksdale, as to what they actually did in treating the plaintiff in this case, as they propose to show the condition these surgeons found the plaintiff in, and what treatment both surgical and medical was given him while in their care, and that the surgical and medical treatment given and administered by these Doctors, was the best known to the medical and su-gical science, and was given promp-ly, and commencing while the plaintiff was still on the train before he was taken to Winona to the hospital and was continued while in the hospital, beginning a few
136 minutes after the accident happened.

Counsel for plaintiff again say, that they do not object to any testimony by these physicians and surgeons, as to when they began to give this man surgical and medical treatment, whether one minute after the wreck, or at any time after the wreck, nor as to the time or place where he was treated.

By the Court: The court only intended to indicate his position as to the facts proposed to be proven with reference to all communications after the plaintiff was taken charge of by the physicians and surgeons of the company.

Q. Dr. Trotter, about what time of day did you first see the plaintiff in this case?

A. About 8 or 9 o'clock in the morning.
Q. Was that the morning of the accident?
A. Yes sir.

The jury was here brought back and the examination proceeded.

Q. Dr. Trotter, please state to the jury the physical condition of the plaintiff in this case when you first saw him that morning?
A. He was suffering from a shock, and loss of blood.

The plaintiff objects to this as incompetent and irrelevant for the reason stated in the absence of the jury.
Sustained. Exception taken.

Q. Please describe to the jury the injuries, if any, that were on the body of the plaintiff?

Plaintiff objects to this for the same reason.

By the Court:

Q. You said you were called to aid these men?
A. Yes sir.
Q. Who called you?
A. The railroad Company.
137 Q. You were called by the defendant to aid them?
A. Yes sir.

The objection is sustained. Exception.

Q. Doctor, please state whether or not medical and surgical treatment was given the plaintiff in this case after he was brought to the hospital?

Objected to as incompetent and irrelevant. Sustained. Exception taken.

Q. Doctor, please state whether or not medical and surgical attention were given to the plaintiff in this case promptly on his arrival at the hospital?
A. Yes sir.
Q. Doctor, please state whether or not, the medical and surgical attention then and there given the plaintiff, was proper, medical science?
A. Yes sir.
Q. In addition to the attention surgical and medical that you have testified to, please state if there were any other treatment which was not proper, or known as maltreatment or malpractice given by the physicians in charge of the plaintiff at that time?

Objected to. Sustained. Exception taken.

Q. Please state, Doctor, if the plaintiff was neglected, and not given prompt and proper medical and surgical attention?

Objected to. Sustained. Exception taken.

Q. Doctor, please state what statements, if any, the plaintiff in this case made to you at that time and place, as to how he was injured, and what he was doing at that time?

Objected to as irrelevant and incompetent. Sustained. Exception taken.

Counsel for defendant request the court to retire the jury so that they can state to the court what they expect to prove by these witnesses, and receive his answers in the absence of the jury, so
138 as to show its competency, relevancy and the materiality.

The Jury was retired and the ruling of the Court on the question was reserved for the present.

Q. Now, go ahead Doctor and answer the question?

A. He stated that he was bumming, riding without permission. He said that he was on a ladder. I did not take much interest in it.

Q. What else doctor, did he state, if anything?

A. Nothing else that I know of.

Q. Please state whether or not he said he was on any train?

A. Yes sir, he said he was on the train.

Q. Please state, whether he said what he was doing on the train, and how he came to be on there?

A. I don't know that he said that at all. I don't remember.

Q. Please state what he -aid, if anything, as to permission of the conductor, or any of the railroad employees, as to his being on the train?

A. He never said anything about that, but I understood he had no permission.

Q. From what he said you understood that?

A. Well, he said he was bumming, and on the train without permission.

Plaintiff objects to the question because, they were communications made to Dr. Trotter as one of the physicians and surgeons of this man.

By the Court: The Objection to these questions is sustained, and the ruling above reserved now made absolute and sustained.

Jury brought back.

Q. Please state if you know, whether employees of the railroad or any other persons injured in the railroad service, or on account of the operation of the trains are taken to that hospital, and were taken at that time.

139 A. Most of the employees on the road are required to pay fifty cents a month, and that entitles them to treatment.

Q. I asked you as to that hospital?

A. I could not say as to that hospital, I never looked into it.

Q. In addition to hospital attention, what other attention medical or surgical aid, if any, is given employees or others by the local surgeons of the defendant when they are injured on account of the operation of defendant's trains?

Objected to, because, it is shown here that the rules and regulations of the hospital department are in writing and that is the best evidence.

Sustained. Exception taken.

Cross-examination:

Q. Doctor, what did you say was your recollection about the time he was brought there?
A. Between eight and nine o'clock.
Q. Was he brought there before the other men?
A. No sir.
Q. Do you know what time it was he was operated on?
A. Not until the next day.
Q. Do you know what time it was that he was given any treatment, other than morphine?
A. He had partially been treated before he was brought there.
Q. Do you know that of your own knowledge?
A. He had bandages, etc., and his wounds were dressed.
Q. He was not operated on until the next day?
A. No sir.

Redirect examination:

Q. Doctor, do you know why he was not operated on until the next day?
A. Yes sir.

Objected to as incompetent and irrelevant, because it is a matter he could only — by communication given the doctor as patient.

140 The objection is overruled. Exception taken.

Q. Please state the reason why?
A. He was at that time laboring under a nervous shock, and we had not settled fully whether we could save his arm or leg, especially his arm, and delated until the next day in order that we might, if possible, save his leg and arm.
Q. Doctor, please state what medical attention was given the plaintiff from the time he was placed in the hospital until the time of the operation the next day?

Objected to for the reasons given above. Sustained. Exception taken.

GEORGE BARNETT, a witness for the defendant, being duly sworn deposed and testified as follows:

Q. Please state your name and age?
A. George L. Barnett, 46 years old.
Q. What business are you engaged in, and what business were you engaged in on the 18th day of July, 1912?
A. Locomotive engineer on the Mississippi Division of the Illinois Central Railroad.
Q. Between what points do your duties take you?
A. Between Memphis, Tenn., and Canton, Miss.
Q. How long have you been working for the Illinois Central?
A. 27 years.

Q. Please state how many years of that service you acted as locomotive engineer?

A. 25 years.

Q. What part of the service, passenger or freight service?

A. The last 17 years in the passenger service.

Q. Please state whether or not you are a competent locomotive engineer?

A. Well, I have stood all examinations.

Q. Please state if you know how to handle a locomotive engine?

A. Yes sir.

141 Q. On the morning of the 18th of last July, beginning about 12 o'clock at night on the 17th, please state who was the engineer of #2 going north from Canton to Memphis?

A. I was on #2.

Q. What time did you take charge?

A. I took charge of it at 12:30.

Q. Where did you take charge?

A. Canton, Mississippi.

Q. Where had that train come from that you took charge of?

A. The train started from New Orleans.

Q. What is done when it reaches Canton, in reference to engine and crew?

A. Change engine and crew.

Q. You changed engines at Canton?

A. Yes sir.

Q. Please state, whether that engine was properly equipped, and in good working order that morning?

A. Yes sir the engine was in first-class order.

Q. How did it respond to your operating the cars?

A. Had no trouble with it whatever.

Q. Who was your conductor that morning?

A. Billy Woods.

Q. Mr. Barnett, at Canton that morning, please state whether or not you received any telegraphic communications in reference to rain?

A. Yes sir, we received a message there.

Q. Please examine this message and see if that is the same message you received there?

A. I can't say that it is. The wording is about the same.

Q. Please state whether you received a copy of it?

A. Yes sir.

Q. Please read that message to the jury?

Witness here read the message to the jury.

142 Q. By whom was that message signed?

A. It was signed W. A. T. Trainmaster.

Q. When did you receive it?

A. I received it that night.

Q. Where did you receive it?

A. At Canton.

Q. What time?

A. Not until we were getting ready to leave. Just before we leave the conductor brings up all orders. He brings them up to me.

Q. Please state, what precaution you took after you received that telegram, if any?

A. I was on the look-out for water. I had the message in my mind and kept a close look-out. Of course I was watching out all the time, and the message about the high water was the first notice I had of it.

Q. Please state whether or not it was raining in Canton?

A. No sir, not to amount to anything.

Q. Please state if you encountered any rain between Canton and Durant?

A. Yes sir, between Pickens and Vaughan.

Q. What was the extent of it?

A. It was a good hard rain.

Q. How wide a territory did that rain seem to be over your track?

A. It was not over half a mile wide before we got to Pickens.

Q. Now, from Pickens to Durant what rain did you encounter?

A. There was a kind of mist all night.

Q. After you got to Durant, please state, if you received any other report or telegram in reference to the water?

A. Yes sir.

Q. Please examine that message and see if that is the one you received?

A. Yes sir.

143 Q. Please read it to the jury?

Witness here read the message to the jury.

Q. Mr. Barnett, please state what precaution you took, if any, in the handling and running of your train, after receipt of this telegram you have read to the jury?

A. After I got that message to look out between Beatty and Sawyer, I did not pay any attention between Durant and Beatty, for there is no place there that we have any trouble.

Q. Did you notice any water between Durant and Beatty?

A. I never noticed any water to amount to anything until we were right south of Vaiden?

Q. How does Big Black run with reference to the railroad track if you know on the Illinois Central from Vaughan north of Vaiden?

A. Big Black runs parallel with the track along there.

Q. Please state, if you encountered any trouble between Durant and Beatty on account of water?

A. No sir no trouble at all.

Q. When you got to Beatty, please state what you did if anything?

A. I did not do anything at Beatty. We are going up hill there, but just north of there is a little dip between Beatty and Sawyer.

Q. What did you do?

A. I shut the engine off and felt down there.

Q. What do you call fe*l*ling?

A. Slowed the train up.

Q. Please state what trouble you expected, if any, on account of water there?

A. None at all.

Q. Please state after you went through that little dip, what kind of a track you — to the north of that?

A. We have the big steel and gravel track. A first-class track.

144 Q. From that point into Winona, please state what character of track there is, as to being durable or not?

A. Yes sir, that is as good as we have. It is a fine track all through there.

Q. After you pass Beatty, how far is it from there to Winona?

A. About 13 or 14 miles.

Q. Please state what precaution, if any, you used between Beatty and Sawyer?

A. Well, I kept a close look-out and slowed down the train, but I never got to Sawyer.

Q. Where is Sawyer?

A. North of Winona.

Q. How far?

A. Three miles.

Q. Are you familiar with the track along the place where your engine got off the track that morning?

A. Yes sir.

Q. What kind of a track is there at that point, and on in to Winona?

A. The track lays what we call running up hill and down hill.

Q. Please state the character of that track as to ballast and rails and its condition?

A. When we leave Vaiden, you go down hill for a mile and a half, and then go through that Big Black bottom, it is a fine track there, and it is that way on to Fultz, and then you go up an incline a little piece, and then you go down hill and up hill into Winona.

Q. Are you familiar with a place known as Merrill's Creek?

A. Yes sir.

Q. Please state what is the character of that track as to being straight or curved?

A. There is a curve south of that creek.

145 Q. About how far south of it?

A. Not very far, about as far as that store out there.

Q. How far in yards?

A. About two hundred and fifty yards.

Q. In coming around that curve that morning, please state what precautions you were using?

A. I was using caution before I got there.

Q. Explain that?

A. On account of getting that message, I slowed up after I went over the north switch at Fultz, and put the brakes on. I had my head out of the window, and was watching all along. I had the train slowed down considerably, and when we got there I saw there was no water to amount to anything. I let the brakes off and started up the little knoll.

Q. What kind of a night was it?
A. It was kind of misty and would keep you from seeing very far.
Q. About how far from the high water were you, when you saw it?
A. Not very far. Not over 25 yards from it.
Q. At what rate of speed were you then going?
A. Not over 35 miles an hour.
Q. What is your usual speed along there?
A. My usual speed along there is 50 or 65 miles an hour.
Q. Why were you not going your usual speed that morning?
A. That message put it up to me. I was looking out for water, and was feeling my way through there.
Q. Please state whether you gained or lost time between Durant and that point?
A. We did not make running time that night.
Q. How much time did you lose?
A. We left Canton about 32 minutes late, and we were about 40 minutes late when the accident happened.
Q. Please state what time you lost between Durant and that point?
146 A. We lost 7 or 8 minutes.
Q. How did you come to lose time?
A. On account of that message, I was looking out for water.
Q. When you saw that water you have mentioned, please state exactly what you did in reference to running your train, and the handling of your engine?
A. When I saw the water I put on what they call the emergency brake and tried to stop right now.
Q. What else did you do?
A. I did not do anything else.
Q. Was there anything else you could do?
A. No sir.
Q. At that point when you put on your emergency brake how far did your train run. That is your engine run?
A. I would say about 75 yards.
Q. From the point where you put on the emergency brake, to the place where you hit the ground, how far was that?
A. About 95 feet, not over that.
Q. You state where you hit the ground, what do you mean by that?
A. I mean where the engine hit it. I never did hit the ground.
Q. Explain how the engine hit the ground at the place where the water was running over the track?
A. That water was running across that track and it looked like a river to me, and when the engine ran into the water, I felt it rise up and down, and it ran a little piece before it turned over.
Q. How far from where it got off to where it stopped?
A. About 75 yards.
Q. You put on the breakes 95 feet away before you hit that point, and then ran about 75 yards after it got off the track on the cross-ties, is that correct?
A. Yes sir.
147 Q. Mr. Barnett, you state you were going 35 miles an hour, please state if you had been running between 55 and 65 miles

an hour what would have happened, if you know as to the train and engine pulling it?

A. The faster you go the harder it is to stop. If we had been making the usual speed, the train would in all probability have turned over.

Q. State whether or not you were on that engine when it turned over?

A. Yes sir.

Q. State whether or not the engine had stopped when it turned over?

A. She had just about stopped, because I was in the cab and trying to get out of the water, and the engine had just about stopped when I felt it lay over on the side.

Q. In reference to your train, please state how the air was working that night?

A. It was working al-right.

Q. When you apply the emergency brake, what effect does that have as to your coaches in the train behind you?

A. The emergency brake is used in the case of emergency. It takes all the air off the train.

Q. Please state where you were when the engine turned over?

A. I was in the cab on the engine.

Q. Is that where you stay in running the engine?

A. Yes sir.

Q. On which side?

A. East side.

Q. Please state whether that is your side of the engine?

A. The right side is mine all the time.

Q. Then going North the east side was yours?

A. Yes sir.

Q. Where was your fireman that night?

148 A. I don't know where he was at that time. He had been on the tank since we left Durant.

Q. Did you see him when you went over?

A. No sir I did not.

Q. After you turned over what did you do?

A. I looked out of the cab and I could not see anything but water.

Q. Why could you not see?

A. The light was out.

Q. Please state to the jury what kind of a headlight you had?

A. *Cetaline.*

Q. Please state whether or not at that time that was the proper and standard headlight?

A. It was.

Q. Please state whether or not that is a better, or inferior light than the others?

A. It is a better light than the others.

Q. Please state whether your light was in proper condition when you turned that curve and saw that water?

A. Yes sir, it was burning al-right.

Q. Do you know how many cars you had that night?

A. No sir, but 10 is the regular train of #2.
Q. How many express and mail cars did you have?
A. One each.
Q. Baggage cars?
A. We had one baggage car.
Q. When you applied the brakes when you saw that water, please state whether you had any way of knowing whether they took effect or not immediately?
A. Yes sir.
Q. Now getting back to Canton, Mr. Barnett, when you left there, how long before your train left there was it before you got down to the depot?
149 A. We were allowed 5 minutes to change engines. I took about 5 minutes to change my engine.
Q. When the other train came in there, please state what you did before you left?
A. I backed up my engine and coupled it on to the train and oiled the engine.
Q. Where was your engine when you got on it?
A. At the round house.
Q. How far is that from the spot where you coupled up?
A. It is about 5 or 6 hundred yards down there.
Q. What time did your engine come up to couple on, in reference to the arrival of that train from New Orleans. How far were you from that train when it stopped that night?
A. I don't know exactly what time we got up there that night. We always come up and stood and waited for the train to come. We stopped North of where the train stopped.
Q. About how far north of the depot?
A. About one or two hundred yards. One hundred yards anyhow.
Q. Who was with you on your engine then?
A. I don't remember any one but the fireman.
Q. When you come around and coupled up, how long did you stand there after you coupled up?
A. I have no record of how long we stayed there but we have five minutes to do the job in.
Q. What were you doing after you coupled up that night to that train?
A. Well, you have to test your air and see if it is working al- right, and oil the engine and examine the brakes.
Q. Was that done that night?
A. Yes sir.
Q. After you did that state whether or not you got out of your engine when the conductor came with your orders?
A. Yes, sir, we get out and get the orders.
150 Q. On what side did you get down?
A. The east side.
Q. How is that in reference to the depot?
A. Same side of the depot.
Q. About how far from the depot was it?

A. I don't know just how far it is.

Q. Please state if you know the plaintiff Mr. Messina, and knew him at that time?

A. I did not know him.

Q. Please state of you have seen him before that?

A. The first time I ever saw him to know him, he was pointed out to me here.

Q. Do you know Mr. Zack Boone?

A. I don't know him, and the first time I ever saw him was after the accident happened.

Q. Please state if your knew Mr. Harry Cole in New Orleans?

A. No sir.

Q. Do you know Mr. Murphy?

A. No sir I do not.

Q. Do you know Mr. Foster?

A. No sir I do not. I never have seen him I don't think.

Q. Do you know Mr. James Parsons?

A. I met him the other day, that was the first time.

Q. While you were standing there on the ground at Canton, on the right side of your engine, please state whether Mr. Messina, Zack Boone, Shorty Wharton and Harry Cole came up to you and had a talk with you?

A. I met Shorty Wharton at the wreck. He was the only one I knew.

Q. Where did you first see him that night?

A. The first time was after we had the trouble up there?

Q. Where?

A. At Fultz.

151 Q. Please state whether that gentleman, or any person at that time and place, while you were at Canton, before taking your train north, came to you and had a conversation with you?

A. No sir.

Q. Please state whether any one of them, or whether Mr. Mesina, asked you for permission to ride on your engine?

A. No sir, I did not. I would lose my job.

Q. Why?

A. They would run me away if I did.

Q. What do you mean by that?

A. They would discharge me. They watch you.

Q. Mr. Barnett, please state, if there is any written rules or regulations in reference to any person or persons riding on the engine, except those in charge of the engine?

A. Yes sir, there are rules forbidding any one to ride.

Objected to because it is in writing and that is the best evidence. Sustained. Exception taken.

Q. Please state if there was any such rule?

A. Yes sir, we have that rule.

Q. Please state whether or not you are examined on these rules?

A. Yes sir, we are examined on these rules when we first go to

work for the Company, and instructed on them by the Trainmaster once a year.

Q. How long prior to that time had you been instructed by the Trainmaster?

A. I don't remember.

Q. Your best recollection?

A. About once a year, I don't know whether it was before or after this. He has a class and goes over the rules with you.

Q. Please examine the book I now show you on page 97, rule 728, and state what book that is and what rule that is?

152 A. This is the book of the transportation department. Every one has one of them, and we are all examined on the rules. This is the last book issued.

Q. Please state if these rules were in effect in July, 1912?

A. Yes sir, that one in reference to riding on the engine was.

Q. Please state if that rule was an old or new rule?

A. To my best recollection it has been the rule all along.

Q. During your twenty four or twenty five years as engineer, what has been the rule of the Company in reference to riding on engines if you know?

A. When I was firing in 1886, it was the rule not to allow any one on there.

Q. Please read that rule to the jury?

Witness here read the rule to the jury.

Q. Please state whether any one presented a written order to you to ride on your engine?

A. No sir.

Q. Please state to this jury, whether you knew of any person or persons, especially the plaintiff, being on your engine between Canton and the place of the wreck?

A. If there was any one on there I did not know it. There was no one on my side at all, and if there was any one there I did not see them.

Q. Please state whether this plaintiff, or any other person with your permission or knowledge were riding on your engine, either on the tank or tender that night?

A. No, sir, they had no permission to ride on there, and there was no one that I knew of.

Q. Please state when you first learned that there was any one on the back of your tender that night?

A. The first time I knew of it, they were off of it.

Q. Where were they?

A. In the water. After we got some light we found them.

Q. What was done with them?

153 A. There was a couple of them. We carried them out of the water about 3.30 in the morning, and put them on Mr. Blackstone's hand car and carried them to the hospital.

Q. How long after the wreck before he got there?

A. Seven or eight minutes, something like that.

Q. What was done to them and what was their condition?

A. I could not tell much about them. One said he had his foot cut off and his leg broken, and we could not tell much about them.

Q. When you carried them back to the hand car, please state if you knew that there was any one else injured?

A. No sir, I would not have know- they was, if they had not been hollowering and making a noise down there.

Q. After they were taken to the hand car did you come back there?

A. Yes sir.

Q. Was there anybody there after you got back?

A. I don't remember whether there was or not.

Q. Was there any way to find out except by the noise they made?

A. No sir, not that at that time. No way to tell except the noise they was making.

Q. Please state what became of those boys taken on a hand car.

A. I don't know what became of them.

Q. Please state whether that water rose any or fell after the wreck?

A. The water must have risen. I noticed it in the cab, when the engine laid down.

Q. Do you know what time it went down?

A. No sir, I don't know, we went to Winona to report the wreck.

Q. How did you get out there?

A. We walked.

Q. How did you go back to the wreck?

A. On the train.

154 Q. What time was it that you got back?

A. Up in the day, I guess it was 10 o'clock before we went back down there. We got something to eat and reported the wreck.

Q. Do you know what time the plaintiff Mr. Mesina, was taken to Winona?

A. No sir, I do not know.

Q. Please state whether you saw him that morning?

A. No, Sir, the first time I ever saw him was day before yesterday.

Q. When did you first learn there were three parties injured?

A. I did not learn much about it. I never had much to — with it.

Q. Please state how many cars were off the track?

A. The mail car was c-reened over to one side, and the express and baggage cars were kinder c-reened over.

Q. What in reference to the passenger coaches?

A. They were not hurt at all.

Q. Were you there when they were put back?

A. No sir.

Q. Do you know how these passengers got away?

A. No sir.

Q. Your train did not take them?

A. No sir.

Q. Mr. Barnett, how long had you operated an engine as engineer along that part of the track where this wreck occurred on the morning of the 18th of July last?

A. Sixteen or seventeen years.

Q. Please state what was the character of the track and road bed at the point where this wreck occurred as to being a high or low track?

A. Right where that accident occurred, it is kinder of a little rise, just before you get to where the washout occurred.

Q. How much elevation would you say was at that point
155 where it occurred, compared to the lowest point of the track north of it between there and Winona, and south of it, say back a couple of miles.

A. Just to look at it, it is down hill into Fultz, and down hill going towards Winona.

Q. What would you say as to that point being high or low?

A. It is high right there where the wreck occurred. It must be fifteen or twenty feet lower north of that.

Q. How about south of it?

A. It is not so much lower, I guess ten or twelve feet south of it.

Q. Please state if you had ever had any trouble yourself in running engines over that place before on account of water?

A. No sir, I never had.

Q. Please state whether or not those orders which you have read here, lead you to believe there was any water at that point?

Objected to, because the orders speak for themselves. Sustained. Exception taken.

Q. Please state whether you were expecting any water at that point that night, and if so, state why you were or were not?

A. No sir, I was not expecting any water at that point that night.

Q. Why were you not?

A. Because, that was a high point right there. I had let the brakes off. I did not think there was any water there.

Cross-examination:

Q. What time was your train due to leave Durant Mr. Barnett?

A. I think it was 1.55 A. M.

Q. What time was it due at Winona?

A. It was due at Winona at 2.42.

Q. That would be 47 minutes?

A. Yes sir.

Q. What is the difference between Durant and Winona?

A. I don't know, about thirty miles.

156 Q. You say you lost some time at Vaiden?

A. South of Vaiden.

Q. How much time did you lose there?

A. About three or four minutes, something like that.

Q. Is your schedule to go that thirty miles in 47 minutes?

A. Yes sir.

Q. Will you take your pencil and figure what rate that is. Is that not about thirty five miles an hour?

A. Yes sir.

Will you tell that jury with water over your track at that place

between Beatty and Sawyer, you were making your regular schedule, although you had notice of it?

A. I said I thought I was.

Q. Did you say you were going thirty five miles an hour?

A. Yes sir.

Q. Were you making your regular schedule on an unsafe track?

A. No sir that would not be making the schedule.

Q. Figure it?

A. We have to go faster than the schedule time.

Q. Did you leave Durant behind time?

A. Yes sir.

Q. How much?

A. Two or three minutes.

Q. You lost two or three minutes at Vaiden?

A. Yes sir.

Q. What do you have your time for, if you don't run on that time?

A. We do.

Q. Don't it show a schedule of about thirty five miles an hour?

A. We have to run faster than that when everything is all right.

Q. Why?

A. Because we have to make up time on these runs.

157 Q. You got that telegram did you?

A. Yes sir.

Q. They feared trouble*d* between Beatty and Sawyer?

A. Yes sir.

Q. They said it was under water between Beatty and Sawyer?

A. No, it did not say that.

Q. Number 5, reporte*r* high water between Beatty and Sawyer?

A. Yes sir.

Q. Reported very hard rains in there for the past three hours, water over track? You got that report?

A. Yes sir.

Q. What were they talking about?

A. It was water over the track, but no damage at Sawyer.

Q. Does not that say there was water over the track between Beatty and Sawyer?

A. Just like it reads. Number 5, reported high water between Beatty and Sawyer, water over track, but no damage at Sawyer.

Q. How far from Sawyer did this happen?

A. Five or six miles south of it.

Q. North of Beatty?

A. Yes sir.

Q. You had that telegram in your pocket?

A. Yes sir.

Q. When you went along there you knew there was heavy rains?

A. Yes sir.

Q. Raining then?

A. Yes sir.

Q. How far ahead could you see?

A. A few yards ahead of you.

Q. You could see only a few yards ahead?

A. Yes sir.
Q. You were making thirty five miles an hour?
A. Yes sir.
Q. Ran in the water?
158 A. Yes sir.
Q. Had that telegram before you?
A. Yes sir.
Q. Were there any stops between Durant and Winona?
A. No sir.
Q. Are you right sure you were not making your usual time there?
A. No sir.
Q. Why not?
A. On account of the message.
Q. At the point where this accident occurred you had reduced your speed?
A. Yes sir.
Q. Your speed was reduced from fifty five or sixty miles to Thirty five miles an hour?
A. Yes sir.
Q. You could only see a few yards ahead of you?
A. Yes sir.
Q. You were still going thirty five miles an hour?
A. Yes sir.
Q. There was a rain?
A. Yes sir.
Q. Somewhere between Sawyer and Beatty the track was under water?
A. No sir.
Q. Did you not say you run in water?
A. Yes sir.
Q. Somewhere between Beatty and Sawyer the track was under water?
A. The message did not say that.
Q. As a result of the warning you had reduced your speed to thirty five miles and hour?
A. Yes sir.
Q. In what distance could you stop that train?
159 A. I could stop it in 150 yards.
Q. Suppose as a result of this rain that trestle had been washed out, going at that speed you could not have stopped it could you?
A. No sir.
Q. That's the way you were running the train then?
A. Yes sir.
Q. Mr. Barnett, you have been in the employ of the Company a long time?
A. Twenty seven years sir.
Q. You have been in the employ longer than most of the engineers?
A. Yes sir.
Q. You make a good salary?

A. Yes sir, about $256.00, a month.
Q. You value your position?
A. Yes sir, you bet I do.
Q. You support your family don't you?
A. Yes sir.
Q. If you should have permitted these men to ride on that engine you would be discharged would you?
A. Yes sir.
Q. You have that much interest in the case?
A. I have that much in my job.
Q. Did you ever get a pink pay check?
A. Some one will have to explain that to me.
Q. Do you know whether or not under the rules of the Company, when an employee is discharged and gets his wages, he gets a pink pay check?
A. No sir, I don't know.
Q. You never got yours?
A. No sir, and I don't want it.

160 Doctor GEORGE BASKERVILLE, a witness on behalf of the defendant, being duly sworn deposed and testified as follows:

Q. Where do you live Doctor?
A. Winona, Miss.
Q. How long have you lived there?
A. Since June 1901.
Q. You are a member of what profession?
A. Medical profession.
Q. Please state what you practice?
A. I practice medicine and surgery.
Q. What college are you a graduate of Doctor?
A. Tulane University and University of Virginia.
Q. Please state Doctor whether you are connected with any sanitarium or hospital at Winona?
A. I am.
Q. How long have you been so connected?
A. Since this hospital was opened there, we are now in our fourth year.
Q. Who is with you?
A. Doctor Barksdale of Vaiden, Mississippi.
Q. In July, 1912, what connection, if any, did you and Dr. Barksdale have with the I. C. R. R. in Mississippi?
A. Dr. Barksdale is the surgeon at Vaiden, and I was at Winona.
Q. The hospital you have, please state what character of practice is conducted there?
A. Principally surgery.
Q. Who performs the surgical operations?
A. Doctor Barksdale and myself.
Q. Please state what connection, if any, the I. C. Railroad Co. has with that institution through you and Dr. Barksdale at that time?

161 A. They had an agreement to put their patients in the Winona infirmary.

Q. When?

A. When they were sick or needed medical attention.

Q. Doctor, do you remember the occasion of the wreck of a train known as number 2, going north on the morning of July 18th, 1912?

A. Yes sir.

Q. When were you first notified?

A. I was called by telephone to come to the infirmary. I was phoned just before day. I don't know the hour, but I was called by the Agent at Winona, and told of the wreck of Number 2, some two or three miles south of Winona, and he did not know how many people were hurt or killed, but to prepare and go down as quick as I could. He said he had phoned Dr. Trotter, who was also surgeon at Winona. I aroused the nurses and had the infirmary prepared. I had every room prepared, think that most of the passengers had been crippled, and at the same time I put in a call for Dr. Barksdale, my partner, who was at Vaiden, and which I got before I was dressed, and I told him to meet me at the wreck as quickly as possible, and I dressed and proceeded to go to the wreck.

Q. How did you go?

A. They told me I would be taken down on the train, and I went over to the station, and after I got to the station, it was a little after daylight, and I saw a car coming with two people on the car, and I was called to attend to these patients. The infirmary is near the I. C. Railroad station, just across from it, and I went with them to the hospital.

Q. Who were they?

A. Harry Cole and R. Murphy. I / put them in their respective rooms, and gave orders as to what should be done and went over to the station.

Q. Please state whether you did what was necessary then?

162 A. I did absolutely what was necessary and left.

Q. Where did you go?

A. To the I. C. Railroad station, and was taken from there to the wreck on the engine. I don't know whether they had any coaches, but I believe they did, but I got on the engine and rode to the wreck, and when I got there I got off and went down the track looking for whoever was hurt, and I was told there was one man badly hurt in the baggage car, which proved to be right, he was badly hurt. I went in there and found Mr. Messina.

Q. The plaintiff?

A. Yes sir.

Q. What did you do for him, if anything?

A. I gave him a hyperdermic then.

Q. Of what?

A. Morphine.

Q. About what time was he taken from that place and put in the hospital at Winona?

A. I did not look at my watch, but I was working as rapidly

as I could from day break until the time he came up there, and I suppose it must have been between 8 and 9 o'clock. It was not later than 9 o'clock.

Q. Did you see Dr. Barksdale, anywhere, and if so, where?

A. He caught a handcar and came up to the wreck as soon as he could get there.

Q. From what point did he come?

A. From Vaiden and got off the car and came over the train.

By Mr. Burch:

Q. Were you there?

A. No sir.

By Mr. Pepper:

Q. Where did you meet him?

A. Between Winona and the wreck.

Q. Do you know whether or not he had been to the wreck before you met him?

163 A. Yes sir he could not go to Winona any other way than over the wreck.

Q. What did you and Dr. Barksdale, do, if anything?

A. He went with me back. I told him they had been properly cared for, and he went with me back to the wreck.

Q. Did you go in the car and see this plaintiff, Mr. Messina?

A. Yes sir.

Q. Do you know whether Dr. Baksdale had seen him prior to that time of your own knowledge?

A. That's the first time I had got to the wreck.

Q. What was the condition of Mr. Messina, as to whether he had been treated by a physician and surgeon up to that time?

A. Yes sir, he had been treated.

Q. Please explain how you know that?

A. He was on a mattress and his wounds had been dressed and bandaged.

Q. How dressed?

Plaintiff objects to anything further as incompetent, irrelevant and immaterial. They are going in the face of the ruling of the court.

Sustained. Exception taken.

Q. When you got back to Winona, what did you do, if anything, in reference to Mr. Messina as to getting him to the hospital?

A. We took him to the hospital.

By Mr. Burch:

Q. You were there as the Railroad Company's surgeon, were you?

A. Yes sir.

Q. You took charge of him as a physician?

A. Yes sir.

Plaintiff objects to any further evidence as to what occurred. Overruled. Exception taken.

Q. How was he taken over there?
A. By hand.
164 Q. Was he on anything?
A. He was on a mattress.
Q. Do you know who carried him?
A. I could not give the names of the people.
Q. Where did you put him?
A. He was put in bed in one of the rooms in the infirmary.
Q. Please state if you made any examination of the plaintiff, Mr. Messina, as to the character of his wounds then?
A. Yes sir, as soon as he was comfortably arranged. His wounds were examined that morning.
Q. About what time of morning was that as — you can recall?
A. It was some time between 9 and 12 o'clock.
Q. What did you then do, if anything, for Mr. Messina?

Plaintiff objects to what they did to the plaintiff, as incompetent and irrelevant under the former ruling of the court. Sustained. Exception taken.

Q. Doctor, please state if you examined Mr. Messina, after he was placed there in the hospital?
A. I did.
Q. Please state what injuries, if any, you found on his person?

Objected to. Sustained. Exception taken.

Q. Doctor, please state if Mr. Messina was operated on and if so by whom?
A. Yes sir, he was by me.

By Mr. Barbour:

Q. Did you operate on him as the company's surgeon, or as the physician of Mr. Messina?
A. I operated on him as Mr. Messina's physician.
Q. You were acting as his physician and not the railroad at that time?
A. Yes sir, when he was operated on.

Plaintiff objects to that because he was operating as this man's physician and the Company's. Sustained. Exception taken.

165 Q. Doctor pleas- state when Mr. Messina was operated on?
A. He was operated on the next day. He was suffering from a shock when he was brought there, and we could not operate until the next day.
Q. Doctor, please state, if Mr. Messina, had been sent to the infirmary in the condition in which you found him in, within thirty minutes or an hour after the accident and after the time he sustained the injuries, whether or not he could have been operated on?

Objected to. Sustained. Exception taken.

Q. Doctor, please state when you became the physician and surgeon of Mr. Messina, and not the Railroad in this matter?

A. I don't know the exact hour, but it was either that night or the next morning.

Q. The attention he had been getting in your infirmary up to the time you have mentioned, please state who you had been acting for?

A. The Railroad Company.

Q. Please state why, if you can that the operation on Mr. Messina, was not performed during the time that you were acting as the surgeon for the railroad company?

By Mr. Barbour:

Q. You get the information from the observation of this man as your patient, in order to answer this question, don't you Doctor? and in examination of him as your patient?

A. Yes sir.

Objected to for the same reasons. Sustained. Exception taken.

Q. Doctor, please state whether or not Mr. Messina, during the time you were acting for him as the surgeon of the railroad was given proper medical and surgical attention?

Objected to for the same reasons. Sustained. Exception taken.

166 Q. Please state Doctor, whether or not there were any remedies or means known to you as a surgeon, and known to medical and surgical science, so far as you know, that could have been used and put in operation in behalf of Mr. Messina, during the time you were acting as the surgeon of the railroad, that you did not use in the case?

A. Everything possible was done for the patient during that time.

Q. Doctor, please state what was the condition of Mr. Messina's leg at the time he was received at the hospital, and now in the presence of the jury please examine Mr. Messina's leg, and explain to the jury the character of the injury to that leg, and also as to any other injuries that were apparent on his body at the time he was received at the hospital, and explain to the jury what was done for those injuries by whom and at what time.

Plaintiff objects to the question for reasons given above, except that part of it that asks at what time it was given him.

Sustained by the court, except that part which asks at what time the relief was given to the patient, which was not objected to. Exception taken.

Q. Please state Doctor at what time the treatment asked about was administered?

A. I could not answer that, because it was from the time he was in the hospital until he left there.

Q. How long was it?

A. I think about three weeks. He was not operated on at one time.

Q. Why not at one time?

Objected to for same reasons heretofore given. Sustained. Exception taken.

Q. Doctor, when Mr. Messina first came to the hospital, please state what your opinion was in reference as to whether his leg and arm could be saved at all or not?

167 A. I was afraid we could not possible save his leg or arm.

Q. Please state Doctor, why you were of that opinion?

Objected to. Sustained. Exception taken.

Q. Doctor, please state, if you know, how long it was before you determined whether or not Mr. Messina's arm or leg could be saved?

Objected to. Sustained. Exception taken.

Q. Please state whether or not, the delay in operating on Mr. Messina, the day following his arrival there, had anything to do with your opinion, as to whether or not his leg and arm could be saved?

Objected to as privilege matter. Sustained. Exception taken.

Q. Doctor, please state how long Mr. Messina remained in your infirmary?

A. About 29 days.

Q. Please state whether or not he left at your instance?

A. No sir.

Q. Please state whether or not you objected to his leaving?

Objected to, because it is a matter not denied. Mr. Messina, admitted he left over the objections of the doctors and gave his reason for it.

Sustained. Exception taken.

Q. Doctor, if Mr. Messina, left the infirmary over your objection, please state why it was, if you know, you objected to his leaving at the time he did?

Objected to for the same reason. Sustained. Exception taken.

Q. Please state Doctor, what effect, if any, there would be, upon the moving of a person leaving your infirmary in the condition that Mr. Messina, was at the time he left, and in the manner in which he left, as to causing a delay in his recovery?

Objected to as it is within the limits of privilege, and can merely go to show Messina's contributory negligence, which is not permitted. Sustained. Exception taken.

168 Q. Doctor, please state who was present, if you know, when Mr. Messina was operated on the first time?

Objected to as incompetent, irrelevant and immaterial. Overruled. Exception taken.

A. The nurses, Dr. Barksdale, Dr. Small, Dr. Trotter and myself.

Q. You mention the nurses, who were they and how many?

A. There were two nurses, the Misses West of our infirmary.

Q. Please state Doctor, whether you are now in the employ of the . C. Railroad Company?

A. No sir, I am not.

Q. Please state whether your partner Dr. Barksdale, is?
A. He is at Vaiden, Mississippi.
Q. Who is the surgeon at Winona?
A. Dr. T. R. Trotter.
Q. The old gentleman who testified here this morning?
A. Yes sir.
Q. Please state Doctor, whether or not Mr. Messina, during the first day that he was in your infirmary, and while you were acting as surgeon for the I. C. Railroad Company, made any statement to you as to how he received this injury, and where he was and what he was doing at the time?

Objected to. Sustained. Exception taken.

Q. Doctor, please state whether or not Mr. Messina made any statement to you, as to whether or not he had any permission to ride on the train, or on the engine at the time he was injured?

Objected to. Sustained. Exception taken.

A. Please state if during the first day he was there, he made any statement to you at all in reference to how he was injured and why he was injured?

Objected to. Sustained. Exception taken.

Cross-examination:

169 Q. You say that it was between 9 and 12 o'clock, Mr. Messina was carried to the hospital there?
A. Yes sir, I could not say what hour.
Q. Were you treating him as his physician, or as the physician of the Railroad Company?
A. At that time as the Railroad surgeon.
Q. All during that day he was at the Sanatorium?
A. Yes sir, from the time he came from the wreck.
Q. During that day you were the Company's surgeon?
A. Yes sir.
Q. When did you cease to become the Railroad Company's surgeon, and become Mr. Messina'- surgeon?
A. Well, I could not tell the hour, but when these patients were brought to the infirmary, they were brought there by the Company.
Q. You say when he was brought there, it was known who he was, pretty generally?
A. I said he was brought there as all patients.
Q. When Mr. Messina was brought there, it was known who he was?
A. Yes sir.
Q. Where he was from?
A. Yes sir.
Q. Where did you get that information from?
A. From him in the coach.
Q. Did Mr. Scott know?
A. I don't know.
Q. Did Mr. Scott, tell you when he was brought there who he was and where he was from?

A. I don't know that he told me.

Q. Did Mr. Scott, tell you that he was Messina, and that he was a switchman working for the I. C. Railroad Company?

A. I don't remember having any conversation with Mr. Scott as to who they were.

170 Q. Was he there?

A. Yes sir.

Q. In communication with Mr. Messina?

A. Yes sir.

Q. Mr. Scott is the claim agent for the I. C. R. R. Co., is he not?

A. Yes sir.

Q. Did you communicate with Mr. Messina's father at Jackson on that day or the next morning?

A. I did several times.

Q. Did your partner?

A. I don't knoe who else.

Q. At the time you operated on him you had been advised by his father that he would pay the bill, and you charged it to his father?

A. Not the first work.

Q. I mean the operation the next day?

A. Yes sir.

Q. Was Dr. Trotter there the first day?

A. Yes sir.

Q. When did you get an agreement from the father of this man that he would pay you?

A. I think was late that evening or the next day possibly. I don't know what hour of the day.

Q. When did you first learn that Mr. Messina was in the employ of the Company?

A. Through Mr. Messina himself.

Q. When was it?

A. Some time during the day.

Q. Did you ever receive compensation from the company for any services rendered Mr. Messina?

A. No sir never have.

Redirect examination:

Q. Doctor, Mr. Barbour has asked you, if you received
171 any pay from the company for treating this man, please state how you were employed at that time?

A. I was paid a salery by them.

Q. You were not paud for individual cases?

A. No sir.

Q. Please state when the other young men were operated on?

A. One was operated on in the morning soon after he got there.

Objected to. Sustained. Exception taken.

Q. When was the other one operated on?

A. In the afternoon.

Q. On which day?

A. T-e same day of the accident.

Q. Please state why they were operated on that day, and why Mr. Messina was not operated on until the next day?

Objected to. Sustained. Exception taken.

Q. When you operated on Mr. Cole and Mr. Murphy please state whether or not you were acting as their physican and surgeon or as the physician and surgeon of the company?

Objected to as immaterial incompetent and foreign to this issue. Sustained. Exception taken.

Q. Please state if there are any rules and regulations governing the hospital arrangements of the I. C. & Y. & M. V. R. R. Company-s?

A. Yes sir.

Q. Please examine the book I now show you and state what it is?

A. I. C. & Y. & M. V. R. R. Company-' hospital department.

Q. What is it?

A. The rules and regulations of the hospital department.

Q. Please state whether these rules were in effect last June and July?

A. Yes sir.

Q. Please refer to page 1 and state whether there is any provision there for treatment of employees and others, and if so read the rules?

172 Objected to. Overruled. Exception taken.

A. "The company will pay all expenses for employees injured on duty and for every other person in their employ injured on the right of way.

Q. Please turn to page eleven and read that rule?

A. "All employees injured while on duty will be take- care of at the expense of the company".

By Mr. Barbour:

Q. Now Doctor you are a good reader turn to rule 15 and read that rule?

A. "All officers and employees of the company contributing to the hospital department will be given the foregoing treatment."

Q. Do you know whether Mr. Messina was contributing at that time or not?

A. He said he was not working at that time.

Q. You don't know whether they took it out of his check or not?

A. No sir.

Dr. J. W. BARKSDALE a witness on behalf of defendant being duly sworn deposed and testified as follows:

Q. What profession are you a member of Doctor?

A. Medical profession.

Q. Please state from what college you received your diploma?

A. Birmingham College.

Q. What?
A. Medicine.
Q. Please state in reference to surgery?
A. I practice surgery exclusively.
Q. Please state whether you are a graduate in surgery?
A. I am.
Q. Where from?
A. Birmingham Medical College.
173 Q. How long have you practiced surgery exclusively?
A. Over three years.
Q. Prior to that time what?
A. General practice?
Q. Where do you live now?
A. Vaiden Mississippi.
Q. How long have you practiced medicine and surgery?
A. Fourteen years this month.
Q. Please state Doctor, what connection you have, if any, in the Winona Hospital?
A. I am a partner Dr. Baskerville.
Q. For what purpose is that hospital maintained there doctor?
A. For the care of the sick, persons afflicted with desease, other than contageous desease, and mainly for surgery. We have very few medical cases.
Q. Doctor, about the eighteenth, of last July, please state if you remember anything in reference to a wreck of a passenger train between Vaiden and Winona?
A. Yes sir.
Q. What time of day did you hear of it?
A. I got notice of it about five o'clock.
Q. In the morning?
A. Yes sir.
Q. Before or after day?
A. Before day.
Q. When you received that information, please state if you received any instructions as to where you should go?
A. The call was from Dr. Baskerville and he asked me to come to Winona, as quick as possible.
Q. Please state if there was any delay?
A. There was not. I telephoned to the depot and had them get out a hand-car to take me to Winona, as close as they could get, and shortly after I got down town and got to the depot the section foreman was there and carried me to the wreck.
174 Q. What did you find?
A. I found the condition of the wreck, and found out who was injured.
Q. Where was Mr. Messina?
A. He had been moved back in the baggage car, and I found that his wounds had been dressed and bandaged.
Q. Please state if you made sufficient examination then to find out if they had been properly dressed?
A. Only in a casual way. I went up on the hand to look after anyone that was injured, and I was on my way to the hospital, and

had to pass the wreck and found that he had been attended to, and that his wounds were dressed and bandaged. I then went to Winona and found a train coming back and went down to the wreck again, and Mr. Messina was carried back to Winona on the train. He got there shortly after we did.

Q. Doctor, about what time was it you saw chim in the baggage car?

A. It was about seven o'clock, I should judge.

Q. How far is it from Vaiden to that point?

A. Eight and a half miles.

Q. How long after you arrived there, was it that you saw him and made an examination of him?

A. Immediately on getting there.

Q. How long did you stay at the wreck?

A. I had no instruments with me, and I was not prepared to do anything for him there.

Q. Where were the other young men?

A. In the hospital at Winona.

Q. Where were your instruments

A. In the hospital at Winona.

Q. How far from the wreck to Winona?

A. About two and a half miles.

Q. Were there any other parties injured there?

A. Not that I know of. There was one man reported who had been hurt, but I don't know it positively.

175 Q. Doctor, from the examination you made of Mr. Messina, in the car did he have the appearance of having been attended to?

A. Yes sir.

Q. Did you remove those bandages?

A. Yes sir.

Q. How did they appear to have been put on him?

By Mr. Barbour:

Q. Are you a partner of Dr. Baskerville?

A. Yes sir.

Q. You were there as a surgeon of the company?

A. Yes sir.

Q. Sent there to take — of the injured parties?

A. Yes sir.

Q. This man Messina was there as your patient under your care?

A. Yes sir.

Plaintiff objects to the last question asked the witness by counsel for the defendant for the reasons gone over.

Sustained. Exception taken.

Q How long did the train remain at the wreck?

A. Stayed there ten or fifteen minutes.

Q. Then went where?

A. Back to Winona.

Q. Please state where Mr. Messina was placed after he got back to the hospital?

A. He was put in a room and put to bed.
Q. Please state what was done, if anything, for his comfort?
A. At the immediate time.
Q. Yes yes.
A. He was give- a hyper-mic of morphine and put to bed, nothing else was done for him then.
Q. Where did you meet Dr. Baskerville that morning?
A. At the wreck.
Q. Please state what was Messina'- condition when he was placed in the hospital as to injuries and where they were?
176 A. His condition was that of a man suffering somewhat from shock. We did not examine him then.

By the Court:

Q. When was this man put under your charge?
A. The moment he entered the hospital.

Objected to. Sustained. Exception taken.

Q. Doctor, from the time you left Vaiden, until you got up to the wreck, please state whether or not there was anything else, other than what you have stated, could have been done for Mr. Messina, before he was carried to the hospital?
A. No sir.
Q. Please state whether or not he was receiving proper treatment?
A. I think he was.
Q. Please state if he was operated on in that hospital, and if so when?
A. He was. The first operation was at twelve or one o'clock on the day on which he was injured.
Q. What was done for him then?

Objected to as incompetent. Sustained. Exception taken.

A. The next operation was done the next morning.
Q. Please state why all of the operations were not done on the first day he arrived there?
A. The condition of his leg and arm was such that we were afraid gangrene might develope, and we thought it best to wait until the next day.
Q. Please state if you could decide on the first day from his condition, whether his leg or arm ought to be cut off?
A. No sir.
Q. Why could you not?

Objected to. Sustained. Exception taken.

Q. How long did he remain in the hospital?
A. Three or four weeks. I am sure of as much as three weeks, but perhaps a day or two more.
177 Q. Please state if he made any statement to you before he was placed in your hospital as to how, where and when he was injured?

Objected to. Sustained. Exception taken.

Q. Please state if he made any statement to you as to whether or

not he had permission to ride on the engine of the train, or any part of the train where he was when he was injured.

Objected to. Sustained. Exception taken.

Cross-examination:

Q. You are the company's surgeon at Vaiden?
A. Yes sir.
Q. How far is Vaiden to the wreck?
A. About eight and a half miles.
Q. How far from Winona to the wreck?
A. About two and a half miles.
Q. You got there before any one from the infirmary at Winona got there?
A. Yes sir.
Q. You say the first day Mr. Messina was there he was suffering from a shock?
A. Yes sir.
Q. His condition from the shock was not such as to prevent you from operating on him?
A. We could not hardly undertake an immediate operation.
Q. You operated on Mr. Cole that day?
A. Yes sir.
Q. Had his leg cut off?
A. Yes sir.
Q. He was not shocked?
A. Yes, some but not at the time of the operation.
Q. Messina was so seriously injured he did not recover as rapidly as Cole did?
A. No sir.
178 Q. Did you operate on him the next day?
A. Yes sir.
Q. Did you telegraph his father that evening?
A. No sir.
Q. Who did?
A. I could not say.
Q. He was not operated on until his father was communicated with?
A. They communicated with us.
Q. Did some one call up Messina's father in Jackson?
A. I think not.
Q. Did he agree to pay the bill?
A. Yes sir.
Q. Then it was you operated on him?
A. Yes sir. We operated on him as soon as we could.
Q. Doctor, Mr. Scott the claim agent was there was he?
A. Yes sir.
Q. Did Mr. Scott advise as to whether or not he was employed by the company at the time he was hurt?
A. Something was said about it.
Q. Did you know that he was employed by the company?
Q. He thought he was not.

Q. He knew who he was did he?
A. Yes sir.
Q. Did Mr. Scott, know that Messina claimed to be a switchman?
A. I don't know sir, whether or not he did.
Q. Did Mr. Scott, acting as the claim agent tell you the company would not be responsible for any treatment given him?
A. He said they would be responsible until such time as we were notified to discontinue the treatment.
Q. You say he told you the company would pay the *will*?
A. Yes sir.
Q. Is it not a fact that this man was paying fifty cents a month hospital dues to the company?
179 A. Yes sir.

Miss JENNIE B. WEST, a witness for the defendant being duly sworn deposed and testified as follows:

Q. Where do you live?
A. Winona Mississippi.
Q. How long have you lived there?
A. Eighteen months.
Q. Where was your former home?
A. West station Mississippi.
Q. What is your profession?
A. Trained nurse.
Q. How long were you in training?
A. Two years.
Q. Where do you now practice your profession?
A. Winona Infirmary Winona Mississippi.
Q. Do remember the occasion of Mr. Messina being brought there?
A. Yes sir.
Q. Wer- you there?
A. Yes sir.
Q. What time of day was he brought there?
A. Between 8 and 9 o'clock in the morning.
Q. What was his condition as to injuries?
A. His limb and arm were both broken.
Q. Which ones if you recall?
A. Left arm and right lower limb I think.
Q. After he was placed in the hospital what was done to make him comfortable?
A. Everything that could be done.
Q. Please state if you had any talk with him at that time and place as to how he was injured?
180 A. He said he was stealing a ride on the train.
Q. What part of it?
A. On the ladder on the engine.
Q. Please state how long he was in the hospital?
A. I don't know how long.
Q. What treatment was given him where there?

Objected to as incompetent and immaterial. Sustained. Exception taken.

Q. Do you remember how many operations were performed on him?

A. Three I think.

Q. Do you remember the occasion of his leaving there with or without the permission of the physician in charge of the hospital?

Objected to for the reason that Mr. Messina himself admits that he left there over the protest of these physicians.

Overruled. Exception taken.

A. He left without the consent of the physicians.

Q. Please state Miss West whether or not Mr. Messina received proper treatment during the time he was there?

Objected to. Sustained. Exception taken.

Q. Miss West please state about what time Mr. Cole and Mr. Murphy was brought there?

A. About seven o'clock in the morning.

Q. Please state if Mr. Messina was brought there before or after you got breakfast?

A. Before we got breakfast.

Q. What is your usual breakfast hour?

A. Between seven and eight o'clock.

Cross-examination:

Q. You had breakfast a little later that morning, on account of the fact notice was received that a train load of injured people were coming in?

A. Yes sir.

181 Q. Are you on duty there day or night?

A. Both when I am needed.

Q. Mr. Cole and Mr. Murphy were brought there before Mr. Messina?

A. Yes sir.

Q. You would not be pos-tive as to the exact time Messina got there. Your opinion now is that he got there about what time?

A. Between seven and eight o'clock.

Q. How was he brought there?

A. I don't know.

Q. You don't remember what treatment he received?

A. No sir.

Q. He had been given morphine?

A. I don't know.

Q. He was given morphine at the hospital?

A. Not often.

Q. He suffered a good deal?

A. At times he did.

Q. You don't know whether they gave him morphine before treating him there or not?

A. No sir.

Q. As a usual thing if you give a person morphine they will begin to talk a good deal?

A. Some people will. It does not effect every one alike.
Q. You don't know whether he had morphine when he was telling you about the injuries?
A. No sir.
Q. Please state who is head nurse in your infirmary?
A. At that time Oir head nurse had left and I was.
Q. Who is now?
A. I am.

W. M. Wood, a witness for the defendant being duly sworn deposed and testified as follows:

182 Q. What is your name?
A. W. M. Wood.
Q. In what business are you engaged?
A. Employed as conductor for the I. C. Railroad Company.
Q. How long have you been so employed?
A. About thirty years.
Q. Were you so employed during June and July 1912?
A. Yes sir.
Q. What train at that time were you conductor of?
A. I was in charge of train No. 2.
Q. Where did you take charge of that train?
A. Canton Mississippi.
Q. Where did that train run to?
A. Different places, Chicago St. Louis & Louisville.
Q. How far did you carry that train?
A. Memphis Tenn.
Q. At Canton, state whether or not that train exchanges its crew, and what became of the crew there that came up from McComb City?
A. We changed crews there. The crew that brought it up goes off to take a rest.
Q. About what time did you leave Canton that morning?
A. About one thirty A. M.
Q. State whether or not you left on the usual time?
A. No sir we were thirty minutes late.
Q. Who was your engineer?
A. George Narnett.
Q. Please state whether you saw him at Durant and where?
A. I did at the engine.
Q. For what purpose were you there at the engine?
A. I delivered train orders at Durant the last message received in regard to the condition of the weather.
Q. Examine this message and see if this one is the one you received?
183 A. It was the one I received at Canton.
Q. Please read it to the jury?

Witness here reads the message to the jury.

Q. What was the condition of the weather that night at Canton as to rain?

A. I went to bed about seven thirty. I had to go very early on account of getting up so soon, and we had had no rain, just a little sprinkle there.

Q. What time did you get down that night?

A. About twelve fifty.

Q. How long were you at the engine before the train left?

A. Two or three minutes.

Q. Had the engine been coupled up when you got there?

A. He had about coupled it up.

Q. You and the engineer received orders in duplicate?

A. Yes sir.

Q. Who gives you the orders?

A. The operator.

Q. What do you do with the orders?

A. I deliver one to the engineer and keep one.

Q. Where was Mr. Barnett when you handed him those orders?

A. At the engine.

Q. What did he do when he got those orders?

A. He got up and I gave him the signal and he went.

Q. Please state if you know Messina the plaintiff here?

A. No sir I never saw him until that night.

Q. Did you know Mr. Boone?

A. No sir.

Q. Did you know Mr. Cole?

A. No sir.

Q. Do you know Mr. Foster, Mr. Murphy, or Mr. Parsons?

A. No sir.

Q. Please state where you saw Messina that night?

A. When they put him in the baggage car.

184 Q. Please state if you have seen these men since you have been here attending court?

A. Yes sir.

Q. Please state if you knew they were on your train that night?

A. No sir, they don't let us know they are on there, when we are on one side they are on the other.

Q. When you got to Durant, did you receive any further orders?

A. Yes sir.

Q. Read this message to the jury?

Witness here reads the message to the jury.

Q. Please state if you gave a copy of that message to Mr. Barnett?

A. Yes sir.

Q. Please state where the engine was standing with reference to the depot at Durant?

A. About a car's length.

Q. Please state if there is a light on the depot side of the track at that point?

A. Yes sir.

Q. There is none on the other side?

A. No sir.

Q. Which side did you pass?

A. The depot side.
Q. When you *b*got off the train that night where did you go?
A. To the telegraph office.
Q. How long were you there?
A. Three or four minutes.
Q. When you came out did you see Cole, Murphy, and Foster on your side of the train?
A. No sir.
Q. When you passed along by the *t*inder of the engine, please state if you noticed any one on the tender of the engine or the mail car next to it?
A. No sir, they get off when the train stops.
185 Q. Please state if you made up or lost time between Durant and the place where the accident occurred that night?
A. We lost time.
Q. About how much?
A. Eight or nine minutes.
Q. Do you know what caused that time to be lost?
A. No sir we were running slow.
Q. Please state what precautions were being used in applying brakes, between Durant and the place of the accident?
A. He applied them three or four times.
Q. What rate of speed were you going?
A. I thought about thirty five miles an hour.
Q. What rate of speed do you usually go at?
A. *I* schedule is thirty eight miles an hour, but of course we run faster than that when we are late.
Q. How fast could you have been going if the track was good?
A. We have run sixty miles an*d* hour, when the track is in good shape.
Q. What kind of a track is it, as to being straight or curved where the wreck occurred?
A. It was on a curve.
Q. How close to Winona was it where the accident happened?
A. About two miles.
Q. Mr. Wood how many cars did you have in your train that night?
A. Ten cars.
Q. What kind of cars?
A. Mail car, Express car, baggage car, two day coaches, and five sleepers.
Q. How many cars were off the track?
A. There were three cars off the track.
Q. When this accident occurred what did you do, and where did you go?
186 A. I went ahead to see what was the matter?
Q. *I* far did you get?
A. As far as the baggage car.
Q. Did you go any farther?
A. I could not get any farther on account of the water.

Q. What time of morning was it?

A. It was about three twenty.

Q. Please state if there was any one injuried there, and if so when you first learned of it?

A. As soon as I got to the baggage car, I heard some one hollar as if in distress and I knew some one was hurt.

Q. What did you do?

A. I went back to the sleeper and got two pillows, a mattress, some blankets and four or five sheets, and had them brought to the baggage car, and they brought a man in there, whom I learned afterwards was Messina.

Q. Where did you meet them bringing him in?

A. At the door, I helped bring him in.

Q. What was done for him?

A. We made him as comfortable as possible, and we sent and got some whiskey, and gave — to him.

Q. Wer- any of the other passengers injured that night?

A. No sir, they were not.

Q. How close were you to the baggage master?

A. We were inside of the door.

Q. Please state what the baggage master said about his coming in there?

A. Nothing at all.

Q. Please state if he used any profane language?

A. No sir, he don't use profane language. He is a church member.

Q. Did you hear any — curse him when he was put in there?

A. No sir.

187 Q. Where did you go after that?

A. I went to Winona to the telegraph office to report the accident.

Q. Please state whether or not these men had been taken up there ahead of you?

A. Murphy and Cole had.

Q. How did you get up to Winona?

A. I walked.

Q. How was Messina taken?

A. I don't know sir.

Q. From your expier-ence in railroading, please state if your train had been going along that night at that point of the track, at the usual rate of speed, whether or not your train would have been thrown off the track.

Objected to. It is the same question asked Mr. Barnett, which we objected to.

Sustained. Exception taken.

Q. Please state if any other cars were off the track except the ones you have mentioned?

A. No sir.

Q. Please state, Mr. Woods, if there was any *ruff* treatment, or any

improper language or treatment used in reference to Mr. Messina that night?

A. No sir there was not.

Cross-examination:

Q. You were not expecting a wreck Mr. Wood when this occurred?
A. No sir.
Q. Going about the usual discharge of your duties?
A. Yes sir.
Q. There were three cars off the track?
A. Yes sir.
Q. Was the mail car turned over?
A. C-reened a little, I could not stand up straight in it.
188 Q. Could you stand on the side of it?
A. No sir, not on either side.
Q. The baggage car was off the track was it?
A. Yes sir.
Q. How was the express car?
A. Same condition as the baggage car.
Q. About how far did the train run off the track before it stopped?
A. About one hundred yards.
Q. Was the track torn up very much at that point?
A. It was washed out you know.
Q. How deep was the water when you got out there over the track?
A. I could not say.
Q. *I* deep was it over the track there?
A. I would say about twelve inches, or probably fourteen inches.
Q. Over what distance was it over the track?
A. For about one hundred yards over the track I would say.
Q. Is it not a fact that that train running thirty miles an hour, with good air *a*quipment could be stopped within 200 feet?
A. I do not know.
Q. You *s*ould stop much quicker on the rails than on the cross ties?
A. Yes sir.
Q. Did it run 100 *hundred* yards through the water and on the cross ties?
A. I don't know, I did not measure it. I did not have occasion to measure it.
Q. Mr. Wood, referring to that telegram, the engineer had information from two sources that there was a heavy rainfall over that district, and water between Beatty and Sawyer?
A. Yes sir.
189 Q. Did you- train stop at any point between Durant and Winona?
A. No, sir.
Q. You got this last message about the weather conditions at Durant?
A. Yes, sir.
Q. Did you meet No. 5 at Durant?

A. Yes, sir.

Q. No. 5 reported water over the track between Beatty and Sawyer?

A. Yes, sir.

Q. That the train they mentioned in that message?

A. Yes, sir.

Q. How fast were you running that night?

A. About thirty miles an hour I would say.

Q. Your schedule is thirty five miles an hour?

A. Yes, sir, a little faster than that, I would say.

Q. The engineer was in a better position to judge how fast he was going than you?

A. I don't know, sir, about that. I have been in the railroad business a long time, and know what I am talking about, I can sit in the coach and tell how fast the train is going by the clinks when it goes over the rail. I can tell where I am at any time during the night.

Q. How fast you are going?

A. Yes, sir.

Q. Can you tell better day or night?

A. It makes no difference I was raised on the railroad.

Q. When you gave the signal to the engineer at Canton that night you were down at the train?

A. No, sir, I gave the signal and cought on to the train.

Q. You don't know what happened there between the engineer and any one else do you?

A. I delivered the orders to the engineer, and he got in the cab and I gave him the signal and he pulled out.

190 Q. What car did you catch?

A. Front end of first passenger car.

Q. About four cars back from the engine?

A. Yes, sir.

Q. You turned and walked back to the car and got on?

A. I gave him the orders, and I got on the train when it came by.

Q. Did you see officer Johnson at Durant that night?

A. I could not say whether I did or not.

Q. After the wreck occurred, you met those two boys who were carried on a hand car to Winona?

A. Yes, sir.

Q. When did you leave the wreck and go to Winona?

A. I could not tell just — time it was. I first saw that there was no one in trouble except Messina, and he was well cared for, and he had a pint of good whiskey.

Q. You did not give an answer to my question what time was it you left the wreck?

A. I could not tell you, but it was about five o'clock.

Q. Day light?

A. Yes, sir.

Q. Yon went to Winona?

A. Yes, sir.

Q. You left Messina in the car?

A. Yes, sir.
Q. What time did you come back?
A. Some time after eight o'clock.
Q. You don't know how Messina got there do you?
A. No, sir.
Q. You did not make any arrangements for him to go there?
A. Yes, sir.
Q. How did you make them?
A. I don't know whether he went on the relief train, or whether Mr. Blackstone the section foreman took him.
191 Q. Did you tell Mr. Blackstone to go and get him?
A. I don't know whether I did or not.
Q. What arrangements did you make to get him up there?
A. I don't know.
Q. You were the conductor and agent of the company in charge of the train?
A. Yes, sir.
Q. Can you tell us what arrangement you made to get this man to Winona?
A. We notified the Doctors to make all arrangements for him, and they came and got him.
Q. The wreck happened at 3:20, and that was five hours after?
A. No, sir, not five hours, we had him put in the baggage car.
Q. Mr. Wood, I will get you to look at that and see if it is not a rule book and rule 837 of the I. C. Railroad Company?
A. Yes, sir, that is a rule book.
Q. Please read that?
A. "During any severe storm they must run with caution over these portions of the track likely to be damaged."
Q. That's with reference to the message you received?
A. Yes, sir, during any storm or heavy rain fall.
Q. That rule refers to the engineer?
A. Yes, sir.
Q. There had been a severe storm that night?
A. We had not struck any storm.
Q. Did this message show you there had?
A. Yes, sir.
Q. Don't that rule of the Company require Mr. Barnett to run with great caution?
A. He was doing that.
Q. He was running thirty miles an hour in a place there where the track was under water?
A. That is slow rate of speed for that train.
192 Q. The schedule is only thirty five miles an hour?
A. It is faster than that.
Q. The schedule calls for thirty five miles an hour between Durant and Winona?
A. Yes, sir, but we have to make faster time than that when we are late.

By Mr. Pepper:

Q. Mr. Wood, please state whether or not that train you were running ever had any trouble on account of water at the point where that accident occurred?

A. No, sir.

Mr. G. D. CAMMERON, a witness for defendant being duly sworn deposed and testified as follows:

Q. Where do you live Mr. Cammeron?

A. Canton, Mississippi.

Q. What business are you engaged in?

A. Railroading.

Q. How long have you been engaged in that business?

A. Twenty six years.

Q. Where was your run during 1912?

A. I have been on the same for twenty years, between Memphis and Canton.

Q. On the morning of July 18th, 1912, do you remember a wreck near Winona of No. 2?

A. Yes, sir.

Q. What car were you in?

A. I was in the baggage car.

Q. What doing?

A. Attending to Railroading business.

Q. What notice did you have?

A. When they stopped and knocked the baggage down around me.

193 Q. What cars were ahead of you?

A. Mail and express cars.

Q. Do you know this, young man here Mr. Messina?

A. No, sir.

Q. Please state if you saw him that night?

A. Yes, sir.

Q. Do remember who brought him in the car, and where were you standing when he was put in the door?

A. I helped to take him in.

Q. What assistance did you render?

A. I did all I could.

Q. What did you do?

A. I went through the train to get some water and whiskey for him, and to see if I could find a doctor, and I did find a doctor and brought him back there.

Q. What did this Doctor do?

A. I don't know, sir.

Q. Please state whether or not you said when they were bringing this man in there, "take that dam son of a bitch of a hobo out of here?"

A. No, sir I did not.

Q. Please state if you used such language at all?

A. No, sir, I did not. I don't use that language.

Q. Please state whether or not you use profanity at all?
A. No, sir, not on that occasion.
Q. Was there any occasion for such expressions on your rpart?
A. No, sir. I did not know anything about the man.
Q. Were any passengers injured?
A. No, sir.

Cross-examination:

Q. Do you know what time the wreck occurred?
A. About 3:30 I think.
Q. You say your car turned partly over?
A. Yes, sir.
194 Q. The track was under water was it?
A. Yes, sir, it was all over the track.
Q. Do you know what time Mr. Wood left there to go to Winona?
A. No, sir.
Q. How long did your train remain there?
A. From 3:30 in the morning until three or four o'clock in the evening.
Q. Did they get the track in a condition so a train could pass over that day?
A. No, sir, it was in the night some time.
Q. Did they transfer the passengers?
A. Yes, sir, they transfer-ed the passengers. I did not get away until that evening.
Q. What time did they take Messina out of your car?
A. About dinner time.
Q. Were you there all the time?
A. Yes, sir.
Q. What time did you get here today Mr. Cammerson?
A. On the early train this morning.

Redirect examination:

Q. Do you know whether thet water rose any after the wreck?
A. After we turned over the engine went into the creek and the water seemed to rise some.
Q. The water was coming against the engine and dam-ed up the creek?
A. Yes, sir.
Q. Did you see any other boys hurt there that night?
A. No, sir, the one I saw the man brought in the car.

JAMES PARSONS, a witness for defendant being duly sworn, deposed and testified as follows:

Q. Where do you live Mr. Parsons?
A. Detroit, Michigan.
195 Q. How long have you lived there?
A. Three years this coming July.
Q. Please state if you ever lived in Jackson, Mississippi?
A. Yes, sir.

Q. How long?
A. About five weeks.
Q. During what month or months and year?
A. June and July, 1912.
Q. Do you remember the night No. 2 was wrecked near Winona about the 18th day of July?
A. Yes, sir, I was there.
Q. Where were you?
A. I left Jackson that night and come up on a freight train.
Q. Please state where you were on that freight train?
A. I was about the middle of it.
Q. State whether or not you had permission to ride on that train?
A. No, sir, I did not.
Q. Where did you go?
A. I went to Canton on the freight.
Q. About what time did you arrive at Canton?
A. About one or two o'clock.
Q. What time day or night?
A. Night.
Q. How did you leave Canton?
A. I left Canton on number 2.
Q. Was that train wrecked?
A. Yes, sir.
Q. State where you were on that train from Canton to Durant?
A. On the tender of the engine.
Q. How close to the mail car?
A. Next to it.
196 Q. Who was on there when you got on?
A. The only ones I saw was Zack Boone, Shorty Whorton, and this Gentleman over here.
Q. Do know where they got on?
A. No, sir.
Q. On there when you got on?
A. Yes, sir.
Q. Which side were you on?
A. Left hand side.
Q. Did you have permission of any one to ride on that train?
A. No, sir.
Q. Had the engineer or any one else given you permission?
A. No, sir.
Q. Did you have any talk with Messina after you got on?
A. Yes, sir.
Q. About where he was going and why he was going?
A. They said they were going to Memphis.
Q. Where was Mr. Messina then?
A. In the Vestibule.
Q. Vestibule of what?
A. In the center of the mail car.
Q. How close to you?
A. About three feet away.
Q. Did you see any one on top of the tank?

A. No, sir.
Q. Did you know whether or not any one was there or not?
A. No, sir.
Q. When you got to Durant what did you do?
A. I looked out on my side and seen the depot was one my side and told the others and we got off on the other side.
Q. Did you see the depot when you got there?
A. Yes, sir.
Q. Where did you go?
A. Acrodd to some coaches on the other side.
197 Q. On the right hand side of the train going north?
A. I could not tell. I don't know whether it was or not.
Q. Over there where you went what was there?
A. We got up on the coaches, and there was a bull come up and asked where we were going.
Q. Where were you standing when he came up there?
A. On the front end of the coaches.
Q. How far from the engine?
A. About six or eight feet.
Q. Were the coaches on siding?
A. Yes, sir.
Q. What conversation, if any, did you have with the bull?
A. He asked what we were doing, and we told him we were going to Memphis. We told him we were switchmen and going to see if we could get a job there. I don't remember all that was said, and when No. 2 started we all cought it.
Q. When you got to where this accident occurred tell what happened there. Did you see Mr. Cole Mr. Murphy, and Mr. Foster and Mr. Messina?
A. Yes, sir.
Q. Where did you first see them?
A. When got on the back of the engine.
Q. Where were they?
A. In the vestibule.
Q. Had you seen them before that time?
A. Yes sir.
Q. Do you know where Messina got?
A. On the fireman side.
Q. Why did you get off that train and go to the coaches?
A. Because we were afraid some one would see us.
Q. What was said, if anything, by Messina, Boone, Shorty Whorn, and yourself about getting off at Durant?
98 A. There was nothing at all said.
Q. Please state why you tried to keep the engineer and other people from seeing you on there?
A. Because, we did not want them to know we was on the train.
Q. When this accident occurred what became of you?
A. I fell off in the water.
Q. How deep was the water?
A. It was over my shoe top where I fell in.
Q. How long did you stay in there?

A. Five or ten minutes, I guess.
Q. Please state if any one was hurt and if so what was done for them?
A. We heard some hollowing and when I come to myself, I could not see anything, and I went to see who was hollowing, and I found Messina he was pinned in by the ladder on the engine.
Q. What did you do for him?
A. The fireman got a crow bar and we prized him loose from there and carried him to the baggage car. I helped carry him up there.
Q. Do — know what time you carried him to the hospital?
A. Yes sir.
Q. What time was it?
A. It was five minutes after eight o'clock something like that.
Q. What became of Cole and Murphy?
A. They was carried up on a hand car by the section foreman.
Q. What road are you now employed by?
A. Michigan Central.
Q. Please state who got you to come back down here?
A. I cannot tell that, I don't know.
Q. Please state if you received any instructions to come?
A. Yes sir, on the night of the 26th, the yard master said.
199 Mr. Miller wanted to see me in the morning, and I said I can work tonight, and he said you had better go off now and see, and I went to see Mr. Miller, and he said the Illinois Central wanted me at Lexington, and he gave me a pass to come down here where he got the pass from I don't know.
Q. In response to that you are here?
A. Yes sir.

Cross-examination:

Q. Mr. Parsons how long were you down here?
A. Five weeks.
Q. What doing?
A. Switching.
Q. How old are you?
A. 37 years old.
Q. Where did you live before going to Michigan to live?
A. In Pennsylvania.
Q. When did you leave home in Pennsylvania?
A. It was in 1898.
Q. How old then?
A. I don't know sir.
Q. What has been your business?
A. Switching.
Q. You have worked in various parts of the country?
A. Yes sir, after I was married.
Q. Were you married when this accident happened?
A. Yes sir.
Q. You was still bumming around?
A. Yes sir.

Q. You were going home to your family when this occurred?
A. Yes sir.
Q. When you got to Durant did you not hear any message being given to the engineer?
A. No sir.
200 Q. How fast was that train running at the time of the wreck?
A. I guess about thirty five miles an hour.
Q. Pretty fast?
A. Yes sir.
Q. Can you tell how deep the water was over the track?
A. I guess about two feet deep in some places I don't know exactly how deep it was.
Q. How far did that train run after it got off the track?
A. I don't know exactly I suppose it was about one hundred.
Q. Was it raining after you left Durant?
A. Just a little not much.
Q. Did you see Mr. Barnett the engineer after the accident?
A. Not until after they came with a light.
Q. You say you assisted in carrying these two boys on the hand-car to the hospital?
A. Yes sir.
Q. How many people were on the hand car?
A. There was six people on there.
Q. Have you talked to Zack Boone about this case?
A. No sir.
Q. Did you tell Zack Boone, and tell him if he would testify for the railroad company that he would get some money out of it? that Scott would pay him and try to get him to go and see him?
A. No sir.
Q. What did you tell him?
A. I told him I heard a pass was sent him to come up here.
Q. You deny that you told him that Scott the claim agent would pay him for his testimony?
A. No sir I did not tell him that.
Q. When did you quit work for the I. C. Railroad Company?
A. In July.
Q. Did you quit or were you discharged?
A. I quit.
201 Q. Do you know what the rule of the Company is when an employee is discharged, what color check is sent him?
A. He gets a yellow check, I think.
Q. Don't you know it is a pink one?
A. No sir, I do not.
Q. Is it a fact or not that you were discharged from the service of the Company, because the reference that you gave had not answered satisfactorily?
A. They got a letter there, and I went donw and quit before they hadd a chance to discharge me.
Q. They got a letter and you heard about it and quit?
A. Yes sir.

By Mr. Pepper:

Q. Please state Mr. Parsons how many roads you have worked for?

A. I have worked for five.

M. L. BLACKSTONE a witness for the defendant being duly sworn deposed and testified as follows:

Q. Where do you live Mr. Blackstone?
A. Winona Mississippi.
Q. How old are you?
A. 58 years old.
Q. What business are you engaged in?
A. Section foreman for the railroad company.
Q. How long and where?
A. I have been section foreman for 41 years this coming May, at Winona, most of the time, and three months at Durant I think. I have been at Winona, since November 7th, 1876.
Q. Were you section foreman there during June and July 1912?
A. Yes sir.
Q. Do you remember the night this wreck occurred?
A. Yes sir.
202 Q. Please state if there was any rain that night?
A. Yes sir, it rained all night long. When I went to bed it was raining.
Q. Do you know whether or not there — any big rain west of you?
A. No sir, I don't know only I was told so by the man that called me that night.
Q. What time was you called out that night?
A. It was about 2:40.
Q. For what purpose were you called out?
A. To look out over the track.
Q. Please state what is the rule in regard to Section Foreman going out?
A. There is a rule during heavy rains and wind storms requiring the Section Foreman to go out and go over the track.
Q. Don't you go without waiting for orders?
A. Yes sir, if he was up.
Q. What time did you get home that night?
A. About Seven o'clock I think.
Q. Please state how long you had been on duty?
A. Thirty six hours.
Q. What caused you to be on duty so long?
A. On account of work north of there.
Q. When you went to bed did you sleep soundly?
A. Yes sir.
Q. When you were called did you go to get orders?
A. No sir, I called the operator and asked him what would be the first trains coming along.
Q. What did you find out?
A. No. 1 and No. 2 would be the first.
Q. What did you then do?

A. I went out after he told me what time the train was coming. I waked my men up and got my light and come out.

203 Q. No. 1 was due at Winona?

A. Both were due there.

Q. Please state if you knew of that wreck at that time?

A. No sir.

Q. When did you learn of it?

A. When I got there.

Q. Explain the conditions?

A. I got there in fifteen or twenty minutes after the wreck. When I got there I met Mr. Barnett and the fireman, and I ask- George if any one was hurt, and he said some boys were hurt, and I heard some hollowing there, and we got two of them and put them on a hand-car, and brought them to Winona.

Q. Have you seen Mr. Parsons since you have been here?

A. Yes sir.

Q. Did he help you put these men on the car?

A. I don't know, all I know is we put them on the car and carried them to the infirmary.

Q. You and this man and two negroes put them on the car?

A. Yes sir.

Q. Please state if you knew at that time any one else was injured or not?

A. No sir.

Q. Mr. Blackstone at that point, please state whether it is a low or high*t* point on that track between Winona and Fultz?

A. It is considered a high point there.

Q. After you come out of this curve and go up the hill, where is the highest point before you turn down in the bottom?

A. You go up grade for two or three hundred yards after you come out of this curve.

Q. Then you go down an incline?

A. Yes sir.

Q. How much incline is there?

A. I suppose fourteen or fifteen feet after you hit the Creek bottom.

204 Q. Now there is a Creek known as Hayes Creek, Please state where that is in reference to the track?

A. It is about half north of Fultz, and runs parallel with the railroad for three or four miles, and empties into Big Black River.

Q. In comin- around that curve there, please state what is the distance coming south to the trestle?

A. About two hundred yards.

Q. What do you weigh Mr. Blackstone?

A. Tw- hundred and s*x*venty five pounds.

Q. Did you come back to the wreck after you carried these boys to Winona?

A. Yes, sir, as soon as I could.

Q. Please state if there was any other train went do*nw* there, and if so when from Winona?

A. No sir, we met the engine as I started back, t*y*e engine of

No. one's train and the engineer asked if the engineer was hurt and I told him no.

Q. Did you go back to the wreck?

A. Yes sir.

Q. About what time?

A. It was about five o'clock.

Q. Do you know when Mr. Messina the plaintiff was taken to Winona?

A. No sir I never did see him.

Q. What did you do when you went back?

A. I stayed a few minutes and went back and saw the Superintendant.

Q. Is there any Creek between that point and Winona?

A. No sir, only a little branch.

Cross-examination:

Q. Mr. Blackstone why were you going back to where this wreck occurred?

A. I went back to fix the track in order.

205 Q. Before the wreck happened why were you hurrying back south?

A. To go over the track to see if there was any place washed out.

Q. You knew this train was due?

A. Yes sir.

Q. You were hurrying to signal it?

A. Yes sir.

Q. That track was under water for one hundred yards?

A. Just about One hundred yards.

Q. How deep over the track?

A. Eight or ten inches.

Q. No more?

A. No sir.

Q. Now Hayes Creek runs parallel with the railroad?

A. Yes sir, it runs parallel, but there is a good way you can't see it from the railroad.

Q. Crosses the railroad south of Winona?

A. Yes sir.

Q. Had any trouble occurred there before on account of a washout?

A. Yes sir.

Q. How far did that occur from — this wreck occurred?

A. The car that got off the track got on the tressle.

Q. The car in this other wreck got on the tressle before it left the track?

A. Yes sir, on the tressle.

Q. How long before that?

A. I think it occurred in April.

Q. And this wreck occurred in July?

A. Yes sir, it was April this last gone two years.

Q. This happened in 1912 last year?

A. Yes sir.

Q. What year in April did this wreck occur?
A. It was two years ago, I think.
206 Q. When No. 2 wrecked that was not the first time the water had gone over the track?
A. Yes sir, since it was raised.
Q. How long since it had been raised?
A. This last July or August, two years ago.
Q. You raised it about two years before this wreck?
A. Yes sir.
Q. The track was raised because it was low and the water would come over it?
A. Yes sir.
Q. About how much did you raise it?
A. About a foot something like that.
Q. On your way back to Winona you met the engine of No. 1?
A. Yes sir.
Q. Did you stop them?
A. No sir, the engineer wanted to know if his brother was hurt and I told him no, and then he went back to Winona. I could not get by until he went back.
Q. After you got those boys off at the infirmary, how long after that was — before you went back to the scene of the wreck?
A. I went back about five o'clock, I think.
Q. Where did you go?
A. I went to see the superintendent and then went back to the wreck to go to work.
Q. Do you know when this relief train got there?
A. No sir, I do not.
Q. Could you give your best judgment?
A. Not long.
Q. Do you know how long it stayed there?
A. No sir, I do not.
Q. You don't know what time it got back?
A. No sir.
207 Q. You don't know when Messina was carried away from there?
A. No sir.
Q. Mr. Blackstone, you have gotten a good many pay checks?
A. Yes sir.
Q. Do you know what is the rule on the part of the company, when a man had been discharged, what color his pay check is, whether they get a pink one or not?
A. No sir.
Q. You never received a pink one?
A. No sir.

Redirect examination:

Q. You say you have been on this section about forty years?
A. No sir. I have been there since 1876, about thirty years.
Q. Please state how that track was, whether low or high?
A. It was a heigh track at that place.

J. S. SPINNER, a witness for the defendant, being duly sworn deposed and testified as follows:

Q. Where do you live?
A. Memphis, Tennessee.
Q. What business or employment are you engaged in?
A. Traveling engineer, Mississippi Division of the Illinois Central Railroad.
Q. How long have you been in that position?
A. A year and five months.
Q. Prior to that time what did you do?
A. Locomotive engineer, on the Illinois Central Railroad.
Q. How old are you?
A. Forty one years old.
Q. In July, 1912, please state what road you were connected with?
A. Illinois Central Railroad.
Q. Please state if you visited the wreck at the place south of Winona, on the morning of the 18th of July?
208 A. Yes sir.
Q. About what time did you get there?
A. Between 8 and 9 o'clock.
Q. That morning?
A. Yes sir.
Q. What were your duties when you got there?
A. Examine the condition of the engine as to the probability of placing the engine on the track with lease possible danger to the engine.
Q. Please state how many cars were off the track and their condition?
A. There were three cars off the track, mail car, baggage car and the express car and the engine.
Q. How long are these cars?
A. About sixty feet.
Q. How did you get the engine out of the creek?
A. We used the derrick, commonly called the wrecker, and built a false bridge on the west side of the engine, and then put chains and ropes around it, and rolled the engine completely over, and built a spur track under the engine back to the main line and pulled it back.
Q. What was the condition as to damage, etc., when you got it back on the track?
A. I estimated it was damaged between seven and eight hundred dollars.
Q. What do they cost?
A. About twenty five thousand dollars.
Q. Please state whether it is now in use?
A. Yes sir.
Q. The cars that were off the track, please state how they were put back?

A. They were straightened up and lifted with the wrecker back on the track.

209 Q. In handling cars with a derrick what effect does it have?

A. It damages them considerably.

Q. From your observation did you notice any damage to the passengers coaches?

A. No sir, none at all.

Q. What connection have you as a traveling engineer with a local engineer, Mr. Barnett, at any time?

A. I have supervision over the engineers and firemens.

Q. What then are your duties?

A. To see that they obey the rules and regulations.

Q. Have your the rules governing the engineers of the Illinois Central Railroad?

A. Yes sir.

Q. Please let me see them?

A. Here they are.

Q. Were they in force on the 18th of July, 1912?

A. Yes sir.

Q. Please state if there is any rule with reference to engineers permitting any one to ride on his engine?

A. Yes sir, Rule No. 728.

Q. Please read that rule to the jury?

A. "No person shall be permitted to ride on the engine, baggage, mail, or express car, except in discharge of his duties, unless permission be given by the superintendent."

Q. Please state whether that rule, so far as your supervision of Mr. Barnett has been complied with?

A. Yes sir.

Q. Please state whether or not it is a part of your duty to see that that rule is complied with?

A. Yes sir, and these engineers never know at any time, where or when I am going to get on the engine. I have authority to stop a train at any time and place.

Q. If the engineer is found permitting people to ride on his engine, what would be done?

210 A. He would be called in office for investigation after investigation if found guilty, we make a recommendation to the superintendent as to punishment.

Q. How did you get down to the wreck?

A. I was on my way to Durant on train known as No. 33, in the sleeping car when I woke up at Winona, and found No. 1 was still there, and I investigated to see what the trouble was, and learned of the accident and went down to the wreck immediately.

Q. How did you get down?

A. I went down on some train that went down there.

Q. What time was it when you got there?

A. Between 8 and 9 o'clock.

Q. Do you know how long that train remained there?

A. No sir, I do not.

Cross-examination:

Q. You say you are traveling engineer, Mr. Spinner?
A. Yes sir.
Q. You don't know anything about what occurred at Canton before this wreck?
A. No sir.
Q. You don't know what notice about the weather was given the engineer and conductor?
A. No sir.
Q. You don't know what happened at the time of the wreck?
A. No sir.
Q. You got there between 8 and 9 o'clock?
A. Yes sir.
Q. You don't remember what train you went down there on?
A. No sir.
Q. Did Mr. Barnett and the conductor Mr. Wood go with you?
A. No sir.
211 Q. Dou — know whether it was your train that carried Messina back to Winona?
A. No sir, I do not.
Q. What time did you get to Winona?
A. I could not tell you that, I was asleep in the sleeping car.
Q. Did you go down there on the first train?
A. Yes sir.
Q. Between 8 and 9 o'clock?
A. Yes sir.

L. M. WILLIAMS, on behalf of defendant, being duly sworn deposed and testified as follows:

Q. Where do you live?
A. Canton, Mississippi.
Q. How long have you lived there?
A. Five years.
Q. What business were you engaged in July, 1912?
A. Flagman for the Illinois Central Railroad Company.
Q. What train?
A. No. 2.
Q. Please state if you remember the occasion of the wreck on the 18th day of July, 1912?
A. Yes sir.
Q. Were you on that train?
A. Yes sir.
Q. What part of the train?
A. It was in the rear end of the train, the observation car.
Q. When did you first learn there was a wreck?
A. About forty minutes after it happened I went back to flag and telegraph to Water Valley about it.
Q. What did you do?
A. The dispatcher ordered me to stay there in case he wanted me.

212 Q. How long did you stay there?
A. I stayed until twelve o'clock.
Q. How far back did you go?
A. Three quarters of a mile.
Q. When the train is running there where are you supposed to be?
A. In the rear car.
Q. Please state whether you are required by the rules to remain there?
A. Yes sir.
Q. When you got off and went back, please — if there was any water on the track?
A. No sir, there was no water on the track.
Q. What time did you come in?
A. I come in about twelve o'clock.

Cross-examination:

Q. That was one of your big one thousand engines?
A. Yes sir, one thousand and sixty two.
Q. You say you did not know about the water being over the track?
A. No sir, I did not see it over the track, I knew there had been some water over the track that night.
Q. How did you know it?
A. High water had been reported.
Q. You had, a message about the hight water?
A. Yes sir.

Defendant rests.

ZACK BOONE, a witness for the plaintiff being called in rebuttal testified as follows:

Q. You have been on the stand before have you?
A. Yes sir.
Q. You were one of the parties on the back end of that engine?
A. Yes sir.
213 Q. I will ask if you know Mr. Parsons, who was a witness here for defendant?
A. Yes sir.
Q. I will ask you if you have seen him here?
A. Yes sir.
Q. Did you see him on last Tuesday?
A. Yes sir.
Q. What time of day?
A. About ten o'clock.
Q. What part of Lexington, did you see him?
A. Down this way. That part of town over there by the Hotel.
Q. Mr. Boone, State to the Court what conversation you had if any with Mr. Parsons with reference to your testifying for the Railroad Company in this case?

A. Parsons told me Mr. Scott wanted to see me, to come back up in town and I was coming this way and he said they sent for him in Detroit, and were paying his expenses, and that Mr. Scott wanted to see me and he would pay my expenses.

Q. State what Mr. Parsons said in reference to your testifying for the Company, that you would get pay for it?

A. He said he did not see any chance for Messina to get anything, and that if I testified for the Company I would get pay.

Q. If you testified for the Railroad Company you would get pay?

A. Yes sir.

Cross-examination:

Q. Mr. Boone, did Mr. Parsons say to you that Mr. Scott wanted to know if you got the transportation he had sent you at Jackson?

A. No sir.

Q. Did you say Mr. Scott told *you* to ask you whether you got it or not, and if you had to come there he wanted to see you?

A. No sir.

214 Q. The Railroad Company always *paid* the expenses of their witnesses, do they not?

A. I guess so.

Q. They also pay them for their time while they are attending court, don't they?

A. Yes sir.

V. P. MESSINA, being called in rebuttal, testified as follows:

Q. Mr. Messina you are the plaintiff in this case?

A. Yes sir.

Q. Been on the stand before?

A. Yes sir.

Q. Mr. Messina on your direct examination you testified of the occasion of your having been put in the baggage car at the time of this wreck, and that some one had addressed some abusive language to you?

A. Yes sir.

Q. Were you here when Mr. Cameron took the stand?

A. Yes sir.

Q. State whether or not he was the man that used the abusive language?

A. No sir, he was not, it was a young man.

Q. Please state to the jury where you were when you were first taken from this wreck?

A. In the baggage car.

Q. Did you remain in that car?

A. No sir, I was taken to the express car.

Q. Was Mr. Cameron in the first or second car?

A. He was in the first.

Q. Was it the man in the first or second car that addressed this abusive language to you?

A. In the second car.

215 Q. Did I understand you to say Mr. Cameron was in the first car?

A. Yes sir.

Q. Was he a young man or old man?

A. He was a young man, the one that cussed me. He was between twenty four and twenty six years old.

Q. State whether or not he was a large man?

A. He would weigh about one hundred and forty pounds.

Cross-examination:

Q. You swore it was the baggagemaster of that train?

A. Yes sir.

Q. You were under that impression until you saw the baggagemaster here?

A. Yes sir.

Q. You live in Jackson?

A. Yes sir.

Q. What is your father's name?

A. Joseph Messina.

Q. Your parents are Italians, are they not?

Objected to as incompetent. Sustained. Exception taken.

Q. Where does your attorney Mr. Burch live?

A. He lives in Jackson.

Q. Where does Mr. Barbour live?

A. Yazoo City.

Q. Where does your attorney Mr. McBee, who was employed at this term of court live?

A. I don't know sir.

Q. Never saw him before?

A. No sir.

I B. C. Trigg, Official Court Stenographer for the 4th. Judicial District, *due* hereby certify that the foregoing pages contain a true, and correct copy of the evidence taken on the trial of the case of V. P. Messina, vs. The I. C. & Y. & M. V. R. R. Co.,

B. C. TRIGG,
Official Stenog.

216 Illinois Central Railroad Company.

Number 78877.

Per Pay Roll for July.

CHICAGO, August 1st, 1912.

Local Treasurer:

Pay to the order of V. P. Messina $9.06. Nine & 6/100 Dollars.
Not good unless countersigned by W. Newell.
Payable at the New Orleans National Bank (14-13).

OTTO F. NAN.

New Orleans, La.

Countersigned.
G. C. LYON,
Local Treasurer.

Ten Dollars or less.

Illinois Central
Central Mississippi
Valley Route
Railroad.

Exhibit A, plaintiff testimony.

217 Illinois Central Railroad Company.

From 589 A.

Telegram.

Time Filed, — M. Time sent, — M.

All trains D uc x 12:28 A. M.

More or less rain all over the District tonight.

WAT.

218 Form 539 A.

Illinois Central Railroad Company.

Telegram.

Time filed, — M. Time sent, — M.

E. & E. No. 1. UC/231 A.
E. & E. No. 28/227 A.

7/18, 1912.

No. 5 reports water high between Beatty and Sawyer, have had very hard rain in there past 3 hours water over track but no damage reported, at Sawyer.

WAT.

219 In the Circuit Court, Holmes County, Miss.

V. P. MESSINA
vs.
ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendants.

We the undersigned attorneys for plaintiff and defendants in above styled cause agree that the stenographic report of the evidence taken on trial thereof and now on file in the Circuit Court Clerk's Office of Holmes County, Mississippi, is correct, and waive approval of same by the Circuit Judge before whom same was tried, and also waive notice of appeal of this case to the Supreme Court.

Witness our signatures this the 31st day of July 1913.

BARBOUR & HENRY,
BURCH & STRICKER,
Attorneys for Plaintiff.
NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

220 STATE OF MISSISSIPPI,
County of Holmes:

In the Circuit Court.

No. 3527.

V. P. MESSINA
vs.
YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

The undersigned Yazoo & Mississippi Valley Railroad Company, Illinois Central Railroad Company, principals and J. B. Boothe & A. M. Pepper and Noel Boothe and Pepper sureties, agree and obligate themselves to pay to V. P. Messina the sum of Twenty Thousand Dollars, unless the said principal obligor shall satisfy the Judgment rendered in the cause above named March 8th A. D. 1913, complained of and this day appealed from by the said principal obligor and also such final judgment as may be made in said cause, and all costs, the said judgment so complained of an- appealed from, be affirmed by The Supreme Court.

Witness our signatures this 26th day of June, A. D. 1913.

YAZOO & MISSISSIPPI VALLEY R. R. CO,
ILLINOIS CENTRAL R. R. CO.,
By J. R. BOOTHE, *Attorney, etc.*
J. R. BOOTHE.
A. M. PEPPER.
NOEL, BOOTHE & PEPPER.

The sureties on the above bond, being by me duly sworn, deposed that, over and above their just debts, liabilities, and their contingent liabilities on other bonds, they were worth in visible property, not exempt from execution or attachment, as follows, to-wit: —.

Subscribed and sworn to before me this 26th day of June A. D., 1913.

[SEAL.] J. D. WEEKS, *Clerk.*

I approve the above bond and sureties.

221 V. P. MESSINA

vs.

ILLINOIS CENTRAL RAILROAD COMPANY and YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

STATE OF MISSISSIPPI,
Holmes County:

I, J. D. Weeks, Cler- of the Circuit Court in and for said County and State, do hereby certify that the foregoing 221 pages contain a true, correct and complete record of the pleadings and proceedings in the cause herein stated as the same appears of record in my office.

In testimony whereof I hereunto set my hand and affixed the seal of said Court at my office in the City of Lexington, State of Mississippi, this 12th day of August, 1913.

[SEAL.] J. D. WEEKS,
Circuit Court Clerk.

222 STATE OF MISSISSIPPI,
Hinds County:

In the Supreme Court, to the October Term, 1913, First District.

No. 16861.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant,

vs.

V. P. MESSINA, Appellee.

Assignments of Errors.

Comes the appellant by its attorneys, Mayes & Mayes, and prays the Court to set aside the judgment of the Circuit Court, and assigns the following errors:

1. The verdict was contrary to the law and the evidence.
2. The verdict was for an amount grossly excessive.
3. The court erred in granting each and every instruction given for plaintiff, as set forth in the transcript.
4. The court erred in refusing each and every instruction refused to defendant company, and in sustaining objections of plaintiff thereto, as shown by the transcript.

5. The Court erred in excluding evidence offered on behalf of defendant company, and in sustaining objections of plaintiff thereto, as shown by the transcript.

6. The Court erred in overruling objections by defendant to testimony and evidence offered on behalf of the plaintiff, and in refusing to exclude the same, as shown by the transcript.

7. The Court erred in overruling the defendant's motion for a new trial, for the reasons set forth therein.

8. The Court erred in modifying the several instructions asked by defendants, in the respects shown in the bill of exceptions and transcript herein.

9. The Court erred in overruling defendant's motion made at the conclusion of Plaintiff's testimony, to exclude the evidence
223 and grant peremptory instruction for defendant.

10. The Court erred in permitting Plaintiff's attorney to comment on testimony of witness Wm. Cook, and state that said Woods had testified that he would have taken plaintiff or one of his associates on the car, as shown by the special bill of exceptions.

11. The Court erred in permitting Plaintiff's attorney to state that the fees collected from its employees were about $600,000.00 as hospital fees to be used to i-demnify stockholders against loss on account of this verdict, as shown by the special bill of exceptions.

Wherefore, the appellant prays that the judgment of the lower court be reversed, and the cause remanded.

MAYES & MAYES,
Attorneys for Appellant.

We hereby certify that we have this day mailed, postage prepaid, copy of the foregoing assignment of errors to opposing counsel, Messrs. Barbour & Henry, Yazoo City November 5th, 1913.

Oral argument desired.

MAYES & MAYES,
Attorneys for Appellant.

224 In the Supreme Court of Mississippi, March Term, A. D. 1915, Monday, April 5th, 1915.

16861.

YAZOO & MISSISSIPPI RAILROAD COMPANY & ILLINOIS CENTRAL RAILROAD COMPANY

vs.

V. P. MESSINA.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Holmes County, and the Court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the February term 1913, on the 7th day of March 1913,

be and the same is hereby affirmed, and that appellee do have and recover of appellants and J. B. Boothe, A. M. Pepper and Noel Boothe and Pepper, sureties in the supersedeas bond the sum of ten thousand dollars the amount of the judgment in the Court below together with the further sum of five hundred dollars, being damages at the rate of five percentum as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid at the rate of six per centum per annum, and also the costs of this cause in this Court and in the lower to be taxed &c.

225 "Copy."†

YAZOO & MISSISSIPPI VALLEY R. R. Co.
v.
V. P. MESSINA.

COOK, *J.*:

Mr. Messina instituted suit against the Railroad Company for personal injuries and recovered a judgment for $10,000.00. The defendant Railroad Company appeals.

The evidence for plaintiff discloses that plaintiff had been employed by the railroad company as a switchman; that the day before the injury he had decided to lay off and go to Memphis, and in pursuance of this purpose, he left Jackson on a freight train to go to Canton; he traveled dead-head, with the permission of the train crew, to Canton.

About midnight of the next day he and several companions secured the permission of the Engineer of the north bound passenger train to ride on the tender of the locomotive from Canton to Memphis. The engineer denied this, and said he had no knowledge that the party was on the tender.

Before the train left Canton the engineer was given a telegram from the train despatcher, which read: "more or less rain all over district tonight."

The plaintiff, Messina, and his companions boarded the locomotive as it pulled out of Canton, and rode to Durant on the tender. When the train reached Durant the engineer received another telegram from the train despatcher reading: "No. 5 reports water high between Beatty and Sawyer; have had very hard rains in there past 3 hours; water over the track but no damage reported, at Sawyer."

The train then proceeded on its way. There was no scheduled stop between Durant and Winona. After the train passed Beatty, it was then in the storm zone. The engineer testified that he
226 then reduced his speed from fifty miles per hour to thirty-five miles per hour. At the place where the derailment occurred, and for some distance south thereof, a creek paralleled the railroad right of way, crossing the track under a trestle about thirty *years* wide. About two hundred and fifty yards south of this trestle there was a curve in the track and the trestle could not be seen from a north bound train until the curve was rounded.

[† In pencil in copy.]

The locomotive was running thirty-five miles per hour, according to the engineer's testimony, and fifty to sixty miles, according to plaintiff's evidence, when the water over the track came in view of the engineer, after he had passed the curve.

The engineer said that he could not have stopped his train in less than one hundred and fifty yards, meaning perhaps, that if the train had remained on the track it would not have been possible to have stopped the train in less than one hundred and fifty yards.

When the danger was discovered the emergency brakes were applied—the engine ran a hundred yards, leaving the track in the mean time, and finally "laid down," with the machinery still running. Three of the cars attached to the locomotive were derailed, plaintiff was caught between the tender and one of those cars and permanently crippled. The extent of the injuries and the consequent suffering justified a verdict for the amount rendered by the jury.

There is no material conflict in the evidence, except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer. This question was a question of fact and its solution was submitted to the jury.

It is conceded by counsel for plaintiff that plaintiff was a
227 trespasser, or a mere licensee, and that the defendant owed him no duty, except to refrain from wilfully and wantonly injuring him. If the engineer did not know that plaintiff was riding on the engine, it is conceded that plaintiff must lose his case. Accepting this as a correct interpretation of the law of the case, we find that the disputed question of fact was submitted to the jury.

Appellant earnestly insists that the facts as to just how and why the wreck occurred were proven and therefore the instruction upon the prima facie statute, Section 1985, Code of 1906, should not have been given. This contention, we think, is not supported by the record. If the evidence for plaintiff in regard to the speed of the train is to be taken as true, the negligence of the engineer was so flagrant, that the court would have been warranted in instructing the jury peremptorily that his conduct was wanton and in reckless disregard of the consequences.

If it can be said that the engineer's estimate of the speed of the train raised a question of fact for the jury's decision, we think the conflict of evidence on this point was submitted to and decided by the jury.

The instruction based upon the statute was a little too stout in some particulars, one of which is that the jury should not have been told, "if all the evidence leaves it doubtful" as to whether the defendant has not met the burden. As recently pointed out by this court in Gentry v. Gulf & Ship Island R. R. Company, this language places a greater burden upon the defendant than the law requires it to sustain. In order to meet the prima facie case made by the proof that the injury was inflicted by a running train, it is not necessary for the defendant to do more than to disclose the facts and if this is done the liability of defendant depends upon the facts and
228 not upon the statutory presumption.

The argument upon the alleged error of the trial court in

refusing to give to the jury the counter instruction the defendant was entitled to receive if it had requested same.

It is true that this Court in the Thornhill case and in the Daniell case said that "when the facts and circumstances have been ascertained, they must be able to say therefrom that the defendant was guilty of negligence."

The court below would, no doubt, have so instructed the jury, if the defendant had seen fit to request such instruction. The defendant did not ask for this instruction and cannot complain that the court did not do what the statute—section 793, Code of 1906, forbids him to do, unless requested in writing.

By the uniform decisions of this court the Circuit Judge cannot volunteer instructions to the jury, and if he does so he has exceeded his power. The plaintiff's instruction stated his side of the case and if the defendant had requested the counter instruction the law of the case would have been complete, except as to the defects noted in plaintiff's instruction.

Inasmuch as the trial court was not asked to give the counter instruction, and inasmuch as the court was without power to volunteer same, no error can be predicated of his failure to give the instruction.

It is argued that the Court did not limit the quantum of damages which plaintiff was entitled to recover, in accordance with the provisions of our consurrent negligence statute. Defendant did not ask an instruction along this line, and we think it was the error of defendant rather than the error of the court that defendant did not get the benefit of the law.

In this case the train was a heavy passenger train, consisting of one mail and one express car, a baggage car, two day coaches and five sleepers.

229 The crew in charge of this train knew of the threatened danger, and when the train entered the danger zone, it seems to us, that the engineer should have reduced his speed to the point where he could have brought it to a stand-still in less than one hundred and fifty yards. The evidence shows that he was rounding a curve in the road, and on account of the existing weather conditions he could not see further than twenty-five yards in front of his locomotive. This, we believe, was taking chances with the human lives in his charge, that was little, if any, short of reckless indifference to the consequences. It appears that at this point, especially the loss of time as compared with the impending danger was of no consequence, and ordinary prudence required that the train should have been under perfect control to avoid the probable catastrophe.

This being our view of the record, taken most favorably for defendant, it follows that the instructions criticised could not have prejudiced appellant.

After the wreck appellant sent its own surgeons to take charge of the injured, and to carry them to the hospital at Winona. There was some evidence tending to show that plaintiff was not given that care and consideration, which he was entitled to receive, while he was at the scene of the wreck.

To rebut this evidence appellant offered to prove by its surgeons that they examined plaintiff at this time and that his wounds had

been dressed and properly treated—and that this was all that could have been done under the circumstances.

At the instance of the plaintiff the trial court excluded this evidence from the jury.

Section 3695 of the Code of 1906, provides "all communications made to a physician or surgeon by a patient under his charge * * * are hereby declared privileged." It will be noted
230 that plaintiff was a patient under the charge of the surgeons selected by defendant.

By our statute "all communications" made to a physician by his patient are privileged. It is argued by appellant that the evidence offered did not consist of "communications", by the patient to the physician; that the physician's information was gained by an inspection of the patient, and that the statute did not cover this character of evidence.

Taken literally this view of the statute may be sound, but when we consider the manifest policy of this sort of legislation we believe that what appellant sought to prove was communicated to him by the patient. Except as a physician he was not qualified to testify. His knowledge of the matter enquired about came to him from his examination of his patient. It is not necessary that the communication should be made by words in order to make it privileged.

There is no more sacred relation of confidence than the relationship of physician and patient, and it was, in our opinion, the intention of the legislature to close the lips of the physician concerning any and everything he knows about the patient by oral communication or from a physical examination of his patient. Quoting from Briggs v. Briggs, 20 Mich., 34: "He had no knowledge upon the subject, except what he obtained in the course of his professional employment and the case appears to be directly within the statute. * * * We do not understand the information here referred to to be confined to communications made by the patient to the physician, but regard it as protecting, with the veil of privilege whatever, in order to enable the physician to prescribe, was disclosed to any of his sense-, and which was in any way brought to his knowledge for that purpose."

The Supreme Court of Missouri had under review a statute
231 similar to ours in Cartside v. Connecticut Mutual Life Ins. Co., 76 Mo. 446, 43 Amer. Rep., 765, and said:

"The construction contended for by the defendant's counsel, that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient, would in our opinion nullify the law. To hold that while under the statute a physician would be forbidden from disclosing a statement made to him by his patient that he was suffering from syphilis; and to allow him to state as the result of his observation and examination of the patient that he was diseased with syphilis, would be to make the statute inconsistent with itself. It is doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a

physician is sealed as to the information acquired orally from his patient it is opened wide as to information acquired from a source upon which he must rely, viz.: his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was over intended by the legislature, and virtually to overthrow it."

The statutes of the several states vary in the language employed, but in our view they were all designed to accomplish the same purpose. Our statute in protecting the patient makes privileged "all communications," and we think it would be absurd to say that what the patient says to the physician is privileged, but what is communicated to the physician by his expert examination and exploration of his patient's body is not privileged. The oral communications are usually of little importance, but the physical examination is always of prime importance.

The fact that the physicians in the present case were not called by the plaintiff but were sent by the defendant to examine
232 or treat plaintiff does not change the legal aspect of the case. The physicians were acting in their professional capacity and the plaintiff was their patient, and all communications to their professional senses are privileged, and the physician however willing he may be to violate the confidence of his patient will not be permitted to do so by the wise provisions of the statute. In the light of such authorities as we have been able to find the overwhelming weight are in accord with this view of the law. The cases may be found in the notes to May Woods v. Town of Lisbon, 16 L. R. A. (N. S.) 886.

It is also contended by appellant that the plaintiff was violating the Act of Congress to Regulate Commerce, approved June 29, 1906, and amended April 13th, 1908, and June 18, 1910, which thus provides:

"No common carrier subject to the provisions of this act shall, after January 1st, 1907, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, except to their families, etc.

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense on conviction shall pay to the United States a penalty of not less than $100 nor more than $2,000 and any person other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty."

We do not understand that the act of Congress referred to has any application to the facts of this case. The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling a passenger train, under no conceivable circumstances has any power to issue free transportation to any person,
233 and we are unable to see the force of the argument along this line. Certainly, a common carrier would not be liable to the penalty provided by the Act of Congress should some employee having no sort of connection with the transportation of passengers, assume to issue a free pass to some prohibited passenger.

If an engineer could lawfully permit a person to ride free, it seems to us that the plaintiff in this case would be entitled to the same degree of care that other passengers are entitled to receive. This seems clear, unless the Act of Congress would change the rights of the passenger. It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the Act of Congress is not directed against acts of the character here involved.

As we interpret the Act of Congress and the regulations adopted by the Interstate Commerce Commission neither are directed against acts such as are disclosed by the record in this case.

After a careful review of the entire record, and after giving due consideration to the able and exhaustive briefs of counsel for appellant, we can find no error of sufficient importance to justify us in disturbing the judgment of the trial Court.

The Daniell case seems to have been unduly magnified. The gist of that case may be found in this sentence: "The rule invoked by the instructions here under consideration is one which should always be acted upon by the court in determining whether a peremptory instruction should be granted, but was not intended to be given in charge to the jury as a guide to be followed by it in arriving at its verdict."

The court did not, by this sentence, intend to say that it was improper to instruct the jury that proof of injury by the running of the train was prima facie evidence of negligence. This court has
234 repeatedly held that that rule could be given in charge to the jury even when all the facts and circumstances were in evidence. The court merely held that the rule that "the circumstances of the accident must be clearly shown and the facts so proven must exonerate the company from blame," was the rule for the guidance of the court in determinating whether or not it could be said, as a matter of law, that the burden of the statute had been met and overthrown.

Whether or not the giving of the instruction in the form criticised in Daniell's case will be held as prejudicial error will necessarily depend upon the facts of each case.

Affirmed.

235 UNITED STATES OF AMERICA,
State of Mississippi:

THE ILLINOIS CENTRAL RAILROAD COMPANY et al.
vs.
V. P. MESSINA.

Petition for -rit of Error.

To the Honorable Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi:

The Petition of the Illinois Central Railroad Company, and of the Yazoo & Mississippi Valley Railroad Company. and of J. B. Boothe, & A. M. Pepper, and of E. F. Noel, J. B. Boothe and A. M. Pepper,

composing the firm of Noel, Boothe & Pepper, show- that on the 5th day of April, 1915, the said Supreme Court of the State of Mississippi, rendered Judgment against the petitioners in a certain cause, wherein your petitioners, the Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, were the appellants, and the other petitioners were the sureties on their appeal bond, and V. P. Messina was the appellee, affirming a judgment of the trial court, which judgment was in effect adverse to the petitioners, the two Railroad Companies, being for Ten Thousand Five Hundred Dollars, with interest at 6% on Ten Thousand Dollars from March 7th, 1913 to date, and for costs and in legal effect awarded execution therein, as will appear by reference to the record and proceedings in said cause: and in said suit was drawn in question the applicability to said suit of certain statutes of the United States of America, to wit; of section 1 and of section 20 of the
236 Act of Congress to regulate Commerce, commonly know- as the Hepburn Act, approved June 29th, 1906, and amended April 13th, 1908, and June 18th, 1910; and the decision of said Supreme Court, denied the applicability to the said cause of the said Act of Congress, and of either Section thereof; and that in said suit the said petitioners, who were the appellants, claimed the benefit of the said Act of Congress and of both sections thereof, as conferring upon — an immunity from liability in the said suit, at the instance of the said appellee, and the said claim of benefit was by the said Supreme Court denied.

And the decision of the said Supreme Court of the State of Mississippi was final, and the said Supreme Court is the Court of the highest resort in said State.

Wherefore, your petitioners are aggrieved, and they pray for a writ of error, with citation and supersedeas, returnable in the Supreme Court of the United States.

And as in duty bo-nd, they will ever pray.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
J. B. BOOTHE,
A. M. PEPPER,
E. F. NOEL,
NOEL, BOOTHE & PEPPER,
By MAYES & MAYES, *Attorneys.*

237 UNITED STATES OF AMERICA, *ss:*

To V. P. Messina, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Supreme Court of the State of Mississippi, wherein the Illinois Central R. R. Co., Yazoo & Mississippi Valley R. R. Co., and J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel Boothe and Pepper, are plaintiffs in

error and wherein you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi, this the 3rd day of June, A. D. 1915.

(Signed) SIDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

UNITED STATES OF AMERICA,
Southern District of Mississippi:

Received the within citation on the 4th day of June 1915, and served the same on the within named, V. P. Messina, on the 4th day of June, 1915 personally, by delivering to him a true and exact copy of the same; also delivered to him at the same time a true and exact copy of the Writ of Error in the same cause, issued pursuant to the fiat of the Honorable Chief Justice of the Supreme Court of Mississippi, by L. B. Moseley, Clerk of the Circuit Court of the United States in and for the Southern District of Mississippi.

This the 4th day of June, A. D. 1915.

JOHN G. CASHMAN, *U. S. M.*,
By C. B. FREERY, *Deputy.*

238 Know all men by these presents, that the Illinois Central Railroad Company, the Yazoo & Mississippi Valley Railroad Company J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel Boothe and Pepper, as Principals, and The Canton Aberdeen and Nashville Railroad Company, and the Chicago, St. Louis & New Orleans Railroad Company, as sureties, are held and firmly bound unto V. P. Messina, in the sum of Twenty Four Thousand Dollars ($24,000.00), for the payment of which, well and truly to be made, we bind ourselves, our heirs successors executors, and administrators, jointly and severally, firmly by these presents.

Witness our signatures this 3rd day of June A. D. 1915.

The condition of the foregoing obligation is suc- as that, whereas lately, at the Supreme Court of the State of Mississippi, in a suit pending in said Court between the Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, appellants, and said V. P. Messina, appellee, jusgment was recovered against the said Illinois Central Railroad Company and The Yazoo & Mississippi Valley Railroad Company, appellants, and J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel Boothe and Pepper, their sureties, in and for the sum of Ten Thousand Five Hundred Dollars ($10-500.00), with interest thereon: and

Whereas the said Illinois Central Railroad Company, and The Yazoo & Mississippi Valley Railroad Company, and others against whom such judgment was rendered, have obtained a writ of error, and filed a copy thereof in the Clerk's office of said Court, to reverse the judgment in the aforesaid suit, — a citation, directed to the

said V. P. Messina, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Wash-
239 ington, within thirty days of the date thereof: Now, therefore if the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company, and their sureties, the said J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel Boothe & Pepper, shall prosecute their said Writ of Error to effect, and shall answer all damage and costs, if they shall fail to make their plea good, then the above obligation to be void otherwise to remain in full force and virtue.

ILLINOIS CENTRAL RAILROAD COMPANY,
By MAYES & MAYES, *Attorneys.*
THE YAZOO & MISSISSIPPI VALLEY RAILROAD CO.,
By MAYES & MAYES, *Attorneys.*
J. B. BOOTHE.
MAYES & MAYES, *Attorneys.*
A. M. PEPPER,
By MAYES & MAYES, *Attorneys.*
E. F. NOEL,
By MAYES & MAYES, *Attorneys.*
NOEL, BOOTHE & PEPPER.
By MAYES & MAYES.
THE CANTON, ABERDEEN & NASHVILLE R. R. CO.,
By EDWARD MAYES, *Attorney in Fact.*
THE CHICAGO, ST LOUIS & NEW ORLEANS R. R. CO.,
By EDWARD MAYES, *Attorney in Fact.*

240 SUPREME COURT OF MISSISSIPPI, *ss:*

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, do hereby certify that there was lodged with me as such clerk on June 3rd, 1915, in the matter of the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company v. V. P. Messina,

1. The original appeal bond of which a copy is herein set forth.
2. A copy of the writ of error as herein set forth.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office in the City of Jackson, Mississippi, this the 3rd day of June A. D. 1915.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

[Endorsed:] Illinois Central Railroad Co. et als., Pl'ffs in Error, vs. V. P. Messina, Def't in Error. Clerk's Certificate.

241 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

In the cause in the record and proceedings, and, also, in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in said suit by V. P. Messina, as plaintiff, and the said Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, as defendants, wherein judgment was rendered in behalf of said plaintiff in said Court on the 5th day of April, 1915, against the said defendants, and their sureties on this appeal bond to the said Supreme Court, in the sum of Ten Thousand Five Hundred Dollars, and interest thereon, and the cost of suit; and in which suit was drawn in question the applicability of a certain statute of the United States of America, being the Act to regulate commerce, commonly called the Hepburn Act, approved June 29th, 1906, and amended April 13th, 1908, and June 18th, 1910, and Sections 1 and 20 of said Act, and the decision of the said Supreme Court of the State of Mississippi was adverse to the applicability of such Act in said cause, and to the defence made in said cause of the said defendants; *and* a manifest error hath happened thereby, to the great damage of the said Illinois Central Railroad Company, and to the said Yazoo & Mississippi Valley Railroad Company, and to the said
242 sureties in its appeal, to-wit, J. B. Boothe, A. M. Pepper, E. F. Noel and Noel, Boothe & Pepper, as by their complaint appears, we, being willing that the error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the 3rd day of July, next, in the said Supreme Court, to be then and there *heard*, that the record *of* proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what *was* right, and according to the law and custom of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, on the 3rd day of June, in the year of our Lord, 1915.

Witness, also, my signature, and the seal of the District Court of the United States in and for the Southern District of Mississippi, this the day and year aforesaid.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk of the District Court of the United States,
Southern District of Mississippi.

Supreme Court of Mississippi.

I, Geo. C. Myers, Clerk of the Supreme Court of Mississippi, by virtue of the within Writ of Error, and in obedience thereto,
243 do hereby send herewith the record and proceedings in said cause, duly certified and authenticated according to law, to the Honorable Supreme Court of the United States.

In testimony whereof, I have caused the Seal of said Court to be hereunto affixed, in the City of Jackson, in the State of Mississippi, this June 23, 1915, in the year of our Lord Nineteen Hundred and Fifteen, and of the independence of the United States, One Hundred and Thirty-nine.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Mississippi.

[Endorsed:] 16861. Illinois Central R. Co. et als, pl'ffs in error, vs. V. P. Messina, Def't in error. Writ of error and clerk's return.

244 STATE OF MISSISSIPPI,
Hinds County:

I, George C. Myers, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the foregoing pages (24½) contain a true and correct transcript of the record on file in this office in the cause of Yazoo & Mississippi Valley Railroad Co. et al. vs. V. P. Messina No. 16861 on the docket of said Court together with copies of the petition for writ of error, Fiat of Chief Justice, Citation to U. S. Supreme Court, Writ of error bond and the original writ of error a copy of which is now on file in my office.

I further certify that I am now about to send *send* said record by express to the Clerk of the United States Supreme Court at Washington, D. C.

Witness my hand with the seal of said Court affixed at office in the City of Jackson, Miss., this the 24th day of June A. D. 1915.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk Supreme Court of Miss.

245 UNITED STATES OF AMERICA:
Supreme Court of the United States.

THE ILLINOIS CENTRAL RAILROAD COMPANY et al., Plaintiff- in Error,
vs.
V. P. MESSINA, Defendant in Error.

Assignment of Errors.

Afterwards, to-wit, on the 3rd. day of June, 1915, before the Justices of the Supreme Court of the United States, at the Capital, in the City of Washington, come the said, the Illinois Central Railroad Company, and the said Yazoo & Mississippi Valley Railroad Company, and the said J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel, Boothe & Pepper, Plaintiffs in error, by their, and each of their, attorney, Edward Mayes, and say that in the record and proceedings aforesaid, there is damaging error in the particular- following, to-wit:

First. The said Supreme Court of the State of Mississippi erred in rendering the Judgment of the 5th. day of April, 1915, whereby the said Plaintiff- in Error were adjudged to pay to the Defendant in Error the sum of Ten Thousand Five Hundred Dollars Principal Sum with interest all as shown in the Writ of Error herein; and in holding and adjudging that the Plaintiff's right of recovery was not barred, and excluded by the operation of Section- 1 and 20 of the Act of Congress to regulate Commerce, commonly known as the Hepburn Act, approved June 29th, 1906, and amended April 13th. 1908, and June 18th. 1910.

246 Second. The Supreme Court also erred in holding and adjudging that prohibitions penalties and disabilities arising and under and because of said Act of Congress, regulating Commerce did not apply in an instance like the one at bar, where the Plaintiff was riding or claims to have been riding from a point in Mississippi to a point in Tennessee without payment of his fair by virtue of permission or license extended to him to that end by the engineer in charge of the locomotive drawing the railroad train.

Third. The Supreme Court also erred in holding and adjudging that the prohibitions penalties and disabilities arising under and because of the said Act of Congress to regulate Commerce did not apply in an instance like the one at bar where the Plaintiff was riding from a point in Mississippi to a point in Tennessee or claims to have been so riding without payment of his fare and secretly without a ticket and without permission or license of the engineer in charge of the train or other persons claimed by him to have been authorized to grant such permission or license; in short, where Plaintiff was stealing a ride, and was a trespasser.

Fourth. The said Supreme Court also erred in applying in and to such its decision and judgment the provision of Section 1985 of the Mississippi Code of 1906; such application of such statute being in violation of the Fourteenth Amendment of the Constitution of

the United States because appellants were -hereby deprived of their property without due process of law, and were denied the equal protection of the laws.

247 Fifth. The Supreme Court also erred in holding and adjudging that a person riding on a passenger train from a point in Mississippi to a point in Tennessee without authority of law and without a ticket or other written or printed evidence of his right to do so, is not thereby using "free transportation" within the meaning of that term as employed in the Act of Congress to regulate Commerce commonly known as the Hepburn Act, approved June 29th, 1906, as amended, and particularly Section 1 of said Act.

Sixth. The said Supreme Court also erred in holding and adjudging that a person not an employee of a common carrier does not violate the Act of Congress to regulate Commerce, known as the Hepburn Act approved June 29th. 1906, as amended and particularly section 1 of said Act in riding from a point in Mississippi to a point in Tennessee without paying the regular published and generally established lawful fa*ir* between such points.

Seventh. The said Supreme Court also erred in holding and adjudging that one in the employ of a common carrier does not violate the provisions of the Act of Congress to regulate Commerce approved June 29th, 1906 and *amended* thereto and particularly Section 1 thereof by making a journey from Canton Mississippi to Memphis Tennessee without paying the lawful- published and establish*ment* fa*ir* thereof, and without having obtained a pass or permit from the proper officer of the railroad company in accordance with the pass rules and regulations issued and promulgated by the interstate commerce commission.

248 And the said Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, and J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel Boothe & Pepper, Plaintiffs in error, pray that the Judgment aforesaid may be reversed and annulled and altogether held for naught, that they may be restored to all things which they have lost by occasion of the said judgment.

THE ILLINOIS CENTRAL
RAILROAD CO.,
THE YAZOO & MISSISSIPPI
VALLEY R. R. CO.,
J. B. BOOTHE,
A. M. PEPPER,
E. F. NOEL,
NOEL, BOOTHE & PEPPER,
By EDWARD MAYES, *Attorney.*

Endorsed on cover: File No. 24,818. Mississippi Supreme Court. Term No. 535. Illinois Central Railroad Company, Yazoo & Mississippi Valley Railroad Company, and J. B. Boothe et al., their sureties, plaintiffs in error, vs. V. P. Messina. Filed June 30th, 1915. File No. 24,818.

FILED

JAN 24 1935

JAMES B. MATTHEWS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 695

ILLINOIS CENTRAL RAILROAD COMPANY, a [illegible]

Plaintiff in Error,

vs.

V. F. MESSINA,

Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR PLAINTIFF IN ERROR

[illegible]

[illegible]

[illegible]

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 535

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Plaintiffs in Error,

vs.

V. P. MESSINA,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This case comes to this court on writ of error from the Supreme Court of Mississippi. The record shows that Messina, the defendant in error, was at one time employed by the Illinois Central Railroad Company as

a switchman. He was injured on the 18th day of July, 1912. Prior to that time, he had been working as a switchman in the yards of the Illinois Central Railroad Company at Jackson, Mississippi. During the month of July, 1912, he does not seem to have done any work as a switchman, but had made two trips as an extra brakeman on a train running from Jackson, Mississippi, to Gwin, Mississippi. Two or three days prior to the injury, he made such a trip. It was shown in the evidence that he had earned as such extra brakeman the sum of $9.56 for services performed during the month of July prior to July 18th (Tr., 63). He left Jackson on the morning of July 17th at 6 o'clock. He did not obtain any leave of absence nor secure permission from anyone in authority to be away from his duties, but did telephone to a clerk in the office of the yardmaster, advising this clerk that he was going to Canton, Miss., a point twenty-three miles north of Jackson. His testimony upon this point is as follows:

"Q. What time did you leave Jackson before this injury?

A. Morning of the 17th of July, 1912.

Q. What time of day?

A. Six o'clock in the morning.

Q. I will ask you, were you compelled to leave Jackson for any reason?

A. No, sir.

Q. What are the rules of the company with reference to giving employes leave of absence?

A. You have to tell the yardmaster you want to lay off.

Q. What did you do with reference to getting permission?

A. I met Tom Leonard and told him I wanted to go to Canton with him and I went and telephoned the Illinois Central yards and I got Merritt over the phone.

Q. Who is Merritt?

A. He works in the office, and I asked for John Harrell.

Q. Who was he?

A. Yardmaster.

Q. What did you do?

A. I told Merritt to tell the yardmaster I was going to Canton" (Tr., 65).

Messina went to Canton on a freight train, paying no fare for his transportation. After Messina reached Canton, he decided to go to Memphis, Tennessee. The Illinois Central has a fast passenger train known as No. 2, northbound, which reaches Canton at 12:55 midnight. Messina, in company with several other persons, claims to have approached the engineer of train No. 2, one George Barnett, and asked permission to ride to Memphis without paying fare. According to Messina's story, the engineer told him that he could not let him and his companions ride to Memphis in the cab of the engine, but that they might ride on the tender of the engine. The engineer denies that he gave Messina and the others permission to ride on the tender, and this was one of the disputed questions of fact at the trial. However this may be, Messina and his companions took their position on the tender of the engine and were in that position at the time they received their injuries.

The evidence shows that the engineer of train No. 2 received at Canton a telegram from the train despatcher reading thus:

"More or less rain all over district to-night."

When the train reached Durant, a point north of Canton, the engineer received another telegram from the train despatcher reading thus:

"No. 5 reports water high between Beatty and Sawyer; have had very hard rains in there past three hours; water over the track, but no damage reported at Sawyer."

When the train reached a point about two or three miles south of Winona, Mississippi, it was derailed on account of the fact that the earth under some of the ties had been washed out, thereby rendering the track insecure.

There is a conflict in the testimony as to how rapidly the train was being run at the time of the derailment, the engineer testifying that it was running not more than thirty-five miles an hour and witnesses for the plaintiff testifying that the speed was much greater, perhaps sixty or seventy miles per hour.

Messina, the defendant in error, was seriously injured when the train was derailed. He brought suit in the Circuit Court of Holmes County, Mississippi, alleging that he was riding on the train by permission of the engineer and that the derailment of the train was caused by the gross negligence of the engineer. He further contended that he was entitled to damages because, after the injury, he was not promptly and skilfully cared for by the surgeons of the railroad company, whose duty it was to look after persons injured in wrecks of this character. There was a recovery in the Circuit Court of Holmes County in the sum of ten thousand dollars, which judgment was affirmed by the Supreme Court of Mississippi. From this judgment this writ of error is prosecuted.

FEDERAL QUESTIONS.

Two federal questions are presented by this record:

First: It is contended by plaintiffs in error that the Supreme Court of Mississippi erroneously held that Messina at the time of the injury was not violating that provision of the Act to Regulate Commerce as amended June 26, 1906, which prohibits any person under penalty from using any interstate free transportation.

Second: It is contended that the Supreme Court of Mississippi, in giving effect in this case to Section 1985 of the Mississippi Code of 1906, denied to plaintiffs in error the equal protection of the law and deprived them of their property without due process of law, in violation of the guaranties of the Fourteenth Amendment to the Constitution of the United States.

These points are appropriately set out in the assignment of errors at page 153 of the printed transcript.

BRIEF.

THE QUESTION ARISING UNDER THE ACT TO REGULATE COMMERCE.

The record in this case will show that the plaintiffs in error seasonably and appropriately called the attention of the Mississippi Supreme Court to the fact that, at the time Messina was injured, he was making an interstate journey from Canton, Miss., to Memphis, Tenn., without having paid anything therefor and that by reason of this fact he was violating that provision of the Interstate Commerce Law which prohibits any person, other than those belonging to certain excepted classes, from using any free transportation. It was therefore argued in the Supreme Court of Mississippi that Messina was violating the law and could not under the Mississippi decisions for that reason recover in this action. Whether he was violating this federal law was, of course, a federal question, and the Mississippi Supreme Court, as will be seen by referring to its opinion (Tr., 146, 147) assumed to decide this question, and did decide it as we contend, erroneously.

In the brief filed by opposing counsel on its motion to dismiss or affirm this case, a motion that was made at this term of the court, there was some suggestion that this federal question was not properly raised in the state courts. However, since the Mississippi Supreme Court entertained the question and actually decided it, as a reference to the opinion of the court will show, this court will not concern itself with the question as to how this point was raised in the state courts. This court has nothing to do with the rules of practice in the Supreme Court of Mississippi, and of course is bound by the fact

that the Supreme Court of Mississippi entertained this question and actually decided it. In the brief filed by opposing counsel in support of its motion, it is said that the question under the Commerce Act was first raised in the reply brief filed by the plaintiffs in error in the Supreme Court of Mississippi. However this may be, it is sufficient to say that the question was actually decided by the Supreme Court of Mississippi. We understand this to be sufficient to give this court jurisdiction to consider the matter.

In the case of

Mallett v. *North Carolina*, 181 U. S., 589,

the record showed that the federal question was not presented to the Supreme Court of the state until a petition was filed for a rehearing. The state court, however, entertained this petition and discussed and decided the federal question. This court, after mentioning certain cases in which it declined to consider federal questions raised too late in the state courts, uses this language:

> "But those were cases in which the Supreme Court of the state refused the petition for a rehearing and dismissed the petition without passing upon the federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the federal questions raised in the petition, but disposed of them in an opinion found in this record."

The court, therefore, took jurisdiction.

In the case of

Beer Co. v. *Massachusetts*, 97 U. S., 25,

here it was urged that the federal question had not en properly raised in the state court, this court uses e following language:

> "But whatever may be the correct course of proceeding in the practice of courts of Massachusetts—

> a matter which it is not our province to investigate—it is apparent from the record that the very point now sought to be argued was made on the trial of the cause in the Superior Court, and was passed upon, and made decisive of the controversy, and was afterwards carried by bill of exceptions to the Superior Judicial Court, and was decided there adverse to the plaintiff in error on the very ground on which it seeks a reversal. * * * This is sufficient for our jurisdiction, and we are bound to consider the question which is thus raised."

The point is quite familiar and will not justify the citation of further authority.

Whether Messina, at the time of his injury, was or was not violating the Act to Regulate Commerce in the respect mentioned is obviously a federal question. Thus it is said by this court:

> "Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employes of the Railway Mail Service when they are not on duty but are traveling for their own benefit or pleasure is, of course, a federal question."
>
> *Southern Pacific Co.* v. *Schuyler*, 227 U. S., 601 (page 610 of the opinion).

The Mississippi Supreme Court, in passing upon the contention that Messina could not recover in this action because he was violating a federal statute at the time of his injury, uses this language:

> "It is also contended by appellant that the plaintiff was violating the Act of Congress to Regulate Commerce, approved June 29, 1906, and amended April 13th, 1908, and June 18, 1910, which thus provides:
>
> 'No common carrier subject to the provisions of this act shall, after January 1st, 1907, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers, except to their families, etc.
>
> Any common carrier violating this provision shall

be, deemed guilty of a misdemeanor and for each offense on conviction shall pay to the United States a penalty of not less than $100 nor more than $2,000 and any person other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty.'

We do not understand that the act of Congress referred to has any application to the facts of this case. The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling a passenger train, under no conceivable circumstances has any power to issue free transportation to any person, and we are unable to see the force of the argument along this line. Certainly, a common carrier would not be liable to the penalty provided by the Act of Congress should some employee having no sort of connection with the transportation of passengers, assume to issue a free pass to some prohibited passenger. If an engineer could lawfully permit a person to ride free, it seems to us that the plaintiff in this case would be entitled to the same degree of care that other passengers are entitled to receive. This seems clear, unless the Act of Congress would change the rights of the passenger. It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the Act of Congress is not directed against acts of the character here involved.

As we interpret the Act of Congress and the regulations adopted by the Interstate Commerce Commission neither are directed against acts such as are disclosed by the record in this case."

It will thus be seen that the Mississippi Supreme Court has construed the federal statute and has held that it had no application to the case of a person situated as was Messina, who had secured an interstate ride either with or without the consent of the engineer, without paying therefor the lawfully published and established rates of the carrier. The question is whether the state court has correctly construed the statute as applied to the facts in this case.

RULING OF THE STATE COURT ERRONEOUS IN ITS CONSTRUCTION AND APPLICATION OF THE INTERSTATE COMMERCE ACT.

Section one of the Hepburn Act provides, *inter alia:*

> "No common carrier subject to the provisions of this act shall, after January 1st, 1907, directly or indirectly issue or give any interstate free ticket, free pass, or free transportation for passengers except to its employes and their families, its officers, agents, surgeons, physicians and attorneys-at-law, etc."

Further along in Section one of the act it is provided:

> "Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense on conviction shall pay to the United States a penalty of not less than $100 nor more than $2,000 and any person other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty."

It will be noted that the act makes it a criminal offense for any person to use free transportation unless he belongs to one of the excepted classes. Some effort is made in the record to show that Messina was an employe, and it may therefore be argued that it was not unlawful for him to secure interstate transportation in view of this fact. But Messina's own evidence heretofore quoted shows that while he had at one time been in the employ of the Illinois Central Railroad Company, this employment had certainly ceased at the time of his injury. True it is that he describes himself in his testimony as an employe, but this could have been only his own conclusion. The facts show that he was a switchman at one time and that during the month of July he had made two trips as an extra brakeman between Jackson, Miss., and Gwin, Miss. The record further shows that he had abandoned his employment on the 17th of July and notified

a clerk in the office of the yardmaster that he was going to Canton. In Messina's own testimony in the case—that before he could be absent from his duties without severing his contract of employment, he must notify the trainmaster—he does not pretend that he notified the trainmaster. His evidence shows that he notified a clerk in the office of the yardmaster. Furthermore, if it be argued that this was sufficient notice under the rules of the company to prevent him from losing his character as an employe, it is to be specially noted that he advised this clerk in the office of the yardmaster that he was going to Canton, and therefore, under his own statement, there could be no implied agreement on the part of the company that he should do more than go to Canton. But the evidence shows that after he reached Canton he decided to go out of the state and make a journey to Memphis. It is therefore clear as a matter of law that, to put it strongest for the defendant in error, he ceased to be an employe at the time he abandoned his employment and began his journey to Memphis. There is nothing in the record to indicate that the railroad company had given its express or implied assent to Messina's going to Memphis at this time. We think there can be no doubt that, as a matter of law, Messina had ceased to be an employe at the time of the injury. Messina was therefore not entitled to free transportation at the time of the injury, since he did not fall within any of the excepted classes. Nor did the Supreme Court of Mississippi hold or intimate in its opinion that he was an employe at the time. The language of the court implies the contrary. Thus it is said in the opinion:

> "The evidence for plaintiff discloses that plaintiff had been employed by the railroad company as a switchman." (Tr., 142.)

Nor in that part of the opinion heretofore quoted,

which deals with the interstate commerce feature of the case is there any intimation by the Mississippi court that Messina had a right to use free transportation or to be carried free. The decision does not rest at all upon the proposition that Messina as an employe had a right to be carried without charge. The Supreme Court of Mississippi, in discussing this phase of the matter, uses this language:

> "It is clear to us that the engineer was not authorized to carry plaintiff free."

The question, therefore, is as to whether it is a violation of the Interstate Commerce Act for a person not belonging to the excepted classes to make an interstate journey under the circumstances disclosed in this record. Messina contends that the engineer permitted him to ride. The Mississippi Supreme Court holds that the Act to Regulate Commerce is not directed against acts of this kind. It is said in the opinion that the common carrier did not issue any free transportation and that Messina was at the time not using free transportation; that the engineer had no authority to issue free transportation; and that the "act of Congress is not directed against acts of the carrier here involved." This is to say that while it is a violation of the law for a railroad company to issue a pass, ticket or other written or printed evidence of the right to travel and while it must be a violation of law for any person to use such a ticket, pass or other written or printed evidence of the right to transportation, yet it is not a violation of the law for a person who has no right to travel free to ride on the tender of a locomotive without any such ticket, pass or other written or printed document. The decision seems to be to the effect that the law is not violated if a person rides without a pass on some part of the train not set aside for passengers. The decision must mean that under the

federal law anyone can with impunity make an interstate journey, provided he does not use a pass or ticket and provided he does not use the accommodations ordinarily set aside for passengers. Such an interpretation of the law would result in totally defeating the wholesome provisions of the Hepburn Act in so far as they apply to the transportation of persons. If this is the law, any citizen of the United States can ride on a freight train at any time with or without the permission of the conductor; and if this view is to prevail, the securing of free transportation will be a comparatively easy matter for anyone whom the employes of a railroad company desire to favor.

The well-known purpose of the Hepburn Act was to avoid discriminations. It was passed to insure equal treatment to all persons seeking to secure passage over the line of a common carrier. But under this interpretation, anyone may be carried free with impunity, provided he does not secure a pass or some other evidence of his right to travel. The only thing necessary under this ruling to escape the penalty of the law is for a man to board a train with the verbal assurance from officers of the railroad or its employes that he will not be disturbed.

The statute denounces the use of "free transportation." "Transportation" has thus been defined by this court:

> "Transportation implies the taking up of persons or property at some point and putting them down at another."

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S., 196.

See also directly in point
Spencer v Chi. & St P Ry Co., 154 N.W. 979.

The Interstate Commerce Commission, in its rules and regulations governing the issuance and recording of passes issued pursuant to the authority conferred upon

the Commission by Section 20 of the Act to Regulate Commerce, in its order of June 8th, 1911 (the contents of which order this court knows judicially, as will be presently shown) recognizes the fact that there can be transportation subject to the act without the issuance of pass tickets; for it is there provided:

> "Pass tickets, hereinafter designated as passes, shall be issued to cover all non-revenue passenger transportation except as provided in paragraphs 23 to 33 inclusive." (See Section 1 of the regulations issued June 8th, 1911.)

Again, it is said in these regulations:

> "The following designated persons may, at the option of carriers, be carried without passes when in the actual performance of their duties, viz., train crews, etc."

This Rule 26 has for its caption "Free Transportation without Passes." Again, Section 29 of these regulations reads:

> "Pass forms must not be used for the transportation of caretakers of property."

It will thus be seen that the Interstate Commerce Commission, interpreting and applying the provisions of the law in a practical manner, has consistently held that there can be transportation under the act without the issuance of passes. Any other view seems to so impossible that it is difficult to argue the matter seriously. See particularly

C. I. & L. R. R. Co. v. *United States*, 219 U. S., 486.

L. & N. R. R. Co. v. *Mottley*, 219 U. S., 467.

Of course, if Messina was privileged to ride on this train without paying any fare, any other person could do so. If he could ride on the tender of the engine without violating the federal law, he could ride anywhere else on the train. If this rule is established there will be an

end to the wholesome restrictive provisions of the Interstate Commerce Act, which deny free transportation to any person other than employes, etc.

If it be said, however, that Messina was an employe, the effect is the same, for there can be no doubt that the Interstate Commerce Commission, under the provisions of Section 20 of the Act to Regulate Commerce, has a right to make rules and regulations governing the issuance of passes and the furnishing of transportation.

Kansas City Southern v. *United States,* 231 U. S., 423.

Baltimore & Ohio R. R. Co. v. *Interstate Commerce Commission,* 221 U. S., 612.

Pursuant to this authority as has heretofore been intimated, the Commisison has promulgated its rules regulating the issuance and recording of passes and has provided that all persons are prohibited from securing free transportation unless they are provided with passes or unless they fall within some of the excepted classes set out in paragraphs 23 to 33 of these pass regulations. It is sufficient to say in regard to the classes which may be carried free without passes that employes making a journey of this kind for their own pleasure or convenience are not included and that under the rules of the Commission it would be unlawful to transport such persons unless they are provided with the passes mentioned in the Commission's regulations.

If it be said that this court will not take judicial notice of the promulgation of these rules, the answer is to be found in the case of

Caha v. *United States,* 152 U. S., 211,

where it is said:

"The rules and regulations prescribed by the Interior Department in respect to contests before the

Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of the opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any Act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice. Without attempting to notice all the cases bearing upon the general question of judicial notice, we may refer to the following: *United States* v. *Teschmaker*, 22 How., 392, 405; *Romero* v. *United States*, 1 Wall., 721; *Armstrong* v. *United States*, 13 Wall., 154; *Jones* v. *United States*, 137 U. S., 202; *Knight* v. *United States Land Association*, 142 U. S., 161, 169; *Jenkins* v. *Collard*, 145 U. S., 546."

It is therefore obvious that even if the court should conclude that Messina was an employe, he would be violating the Act to Regulate Commerce in that he was making a journey without being provided with pass.

As has been heretofore suggested, the Mississippi court, in construing this statute, did not pretend that Messina was entitled to transportation. The Mississippi court decided that it was not a violation of law for him to ride with or without the permission of the engineer from Canton to Memphis. This, we confidently submit, is so obviously erroneous that there can be no room for argument or discussion. Indeed, opposing counsel, in the brief which they filed on its motion to dismiss, do not

seriously contend that the federal act has been correctly construed by the Mississippi Supreme Court.

ERRONEOUS CONSTRUCTION OF THE INTERSTATE COMMERCE ACT CONSTITUTES REVERSIBLE ERROR IN THIS CASE.

Assuming, therefore, that the Mississippi court fell into error in holding that it was not a violation of the Interstate Commerce Act on the part of Messina to make this trip in the way described, it remains to consider whether this error of the court is of a substantial nature and is sufficient to bring about a reversal in this case. It will no doubt be earnestly argued by the defendant in error that the error was of no importance in the light of the decision of this court in

Southern Pacific Co. v. *Schuyler*, 227 U. S., 601.

The argument is that this court held in the Schuyler case that even though the injured person was at the time of his injury violating a federal statute, it would not prevent a recovery. The case will be considered a little later more in detail.

It is important here for this court to understand the attitude of the law in the State of Mississippi dealing with the right of a person to recover if his injury was so connected with an illegal transaction as to make it necessary for the plaintiff to prove that he himself was a lawbreaker in the course of establishing his claim in court against the defendant. The argument in the Supreme Court of Mississippi was that since it was settled in Mississippi that one who is engaged in an unlawful or immoral enterprise could not recover if damaged by another during the continuance of his unlawful conduct, Messina, in this case, was precluded from recovering, since at the very time of his injury he was making an interstate journey in violation of the federal statute.

It was not urged in that court, nor is it urged here, that it was a matter of any importance whether the statute being violated was a state statute or a federal statute. It so happened that Messina, at the time of his injury, was violating a federal law. The result would have been precisely the same if he had been violating a state law. Our contention was in that court that since it was the public policy of the state that no one could recover who was violating the law, Messina was precluded from recovering in this case. Our contention was supported by the case of

Western Union Telegraph Co. v. *McLaurin*, 66 Sou. Rep., 739 (not yet officially reported).

This case declares the policy of the Mississippi courts, and it is of the first importance that it should be carefully considered and thoroughly understood.

In that case it appeared that McLaurin had formed some illicit connection with a woman living at Selma, Alabama. She sent to him at Toomsuba, Miss., two telegrams, one reading:

"Call me up at once at 9196.

ALICE."

The other:

"Please come home. I am sick.

ALICE."

These messages were negligently delivered by the telegraph company to McLaurin's mother. As a result, the family of McLaurin became informed of his relations with this woman, greatly to his mortification and to the injury of his character. He sued for damages and substantial damages were awarded him by the trial court. The court held that the telegraph company had violated its public duty. The language used in characterizing the conduct of the telegraph company is as follows:

"The telegraph company did, however, violate its

public duties. Policy requires that a public service corporation should be held responsible for the wilful violation of its duties to those entitled to command its services. Punitive or exemplary damages are authorized in proper cases upon the theory that punishment will deter others from committing wilful and wanton wrongs. Punitive damages are not given for the purpose of compensating or enriching individuals, but for their supposed deterrent effect."

It will thus be seen that the court held that there had been a clear violation of public duty on the part of the telegraph company, and intimates very strongly that but for the misconduct of the plaintiff punitive damages would have been authorized. It denied, however, to McLaurin any right of recovery for the reason that the record showed that he himself was engaged in an immoral act or in the furtherance of an immoral relation. It was said in the opinion:

"If a plaintiff cannot open his case without showing that he has broken a law, a court will not aid him. It has been said that the objection may often sound very ill in the mouth of the defendant but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. The principle of public policy is that no court will lend its aid to a party who grounds his action upon an immoral or illegal act.

The principle has been applied in numerous cases wherein its application seems to have been of doubtful propriety, but the principle, as stated, is undoubtedly sound in logic, and necessarily affords the true test for the guidance of the courts."

Again it is said further along in the opinion:

"The plaintiff cannot travel to actual damages without the aid of his immoral acts, and it is the policy of the state to deny the plaintiff the assistance of the courts for the recovery of such damages. On the other hand, public policy permits the imposition of punitive damages in the interest of the public,

without regard to the pecuniary interests of the individual suing.

We think the apparently conflicting principles may be harmonized by holding that, when it appears that plaintiff's right of recovery is based upon his own wrongs, the courts will bring his case to an end and disregard the wrongs of the defendant. Exemplary damages are never recoverable as a matter of right. It is always within the discretion of the jury to refuse to find for such damages. In cases like the present one, we believe that the case should end because the aid of the court cannot be invoked at all to adjust the differences in dispute."

The court cites with approval Cooley on Torts, Vol. 1, page 172, in which this language is used:

"Where one has suffered from participation in an unlawful undertaking, what justice can there be in any demand on his part that the state shall supply courts and officers and incur expenses to indemnify him against a loss he has encountered through a disregard of its laws? Here the question is not merely one of what is right as between himself and his associates, but what is best for the interests of the state."

The Mississippi court in this case fully recognized the fact that Judge Cooley in this discussion was considering joint wrongs where the parties were engaged in a common enterprise, but the Mississippi court held that the principle would apply in any case, where it is necessary for the plaintiff to prove his own illegal act in order to recover. Now, it is evident that if this principle is applied to the case at bar, there could be no recovery. The plaintiff himself must show that he was on the train and explain the reason why he was on the train and the place where he was standing at the time of the wreck. The opinion of the court holds that there could be no recovery in this case unless the engineer knew of Messina's presence on the train, or rather the court said that it was agreed by all parties that there could be no recovery un-

less the engineer had some knowledge that Messina was on the train. It was therefore necessary for Messina to show by his proof that the engineer knew he was there and knew where he had placed himself. In other words, all the facts and details in regard to Messina's presence and the occasion for his being there had to be brought out by the plaintiff himself in order to get to the jury with his case. Now, when it was urged in the Mississippi court that the principle of the McLaurin case would prevent a recovery here, the Mississippi court did not reply by saying that there was any fault with the principle of law contended for, but the reply of the Mississippi court was that Messina was not violating the federal law. It is nowhere intimated in the decision of the Mississippi court that Messina could have recovered under the state's policy even though he had been engaged in an unlawful act or enterprise. The inference is strong that the Mississippi court would have adhered to the doctrine expressed in the McLaurin case and would have held that Messina could not recover except for the fact that the Mississippi court thought that he was not a lawbreaker at the time of his injury.

Doubtless, cases can be cited from jurisdictions other than Mississippi in support of the doctrine that one may recover in cases of this kind even though the plaintiff is engaged in an illegal act. But these cases have no weight here. This court is not concerned with the question as to whether the Mississippi court, in its ruling in the McLaurin case, is in line with the weight of authority or at variance with the weight of authority. The question is a state question and one which no court is competent to decide except the Supreme Court of Mississippi. The Mississippi court has announced the public policy of that state and has seen fit to adopt that line of decisions that denies the right of recovery to any

individual if it is necessary for him to prove his own wrongdoing in the process of establishing his case against the tort feasor from whom he seeks damages.

It cannot be said, however, that the Mississippi court is without abundant support in the authorities from other jurisdictions. In the case of

Pullman Car Company v. *Transportation Co.*, 171 U. S., 138,

this court cites with apparent approval the rule as laid down by Lord Mansfield in *Holman* v. *Johnson*, 1 Cowper, 341. This language is used by Mr. Justice Peckham:

> "The principle is not new; but, on the contrary, it has been frequently announced, commencing in cases considerably over a hundred years old. It was said by Lord Mansfield, in *Holman* v. *Johnson*, 1 Cowper, 341, decided in 1775, that 'the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

It is true that this court in this case was talking about an illegal contract, and it appears that Lord Mansfield, in the *Holman case*, was deciding a point growing out of an illegal contract. But the language is broad and sanctions the doctrine that wherever a cause of action is based upon any illegal act, no suit arising either from a contract or from tort can be maintained.

In

McGrath v. *Merwin*, 112 Mass., 467,

it appeared that a suit was brought by the plaintiff upon

the allegation that he was working for the defendant in a wheel-pit and that by reason of the negligence and carelessness of the defendant in setting certain machinery in motion, the plaintiff was injured. It appeared, however, that the injury occurred on the Sabbath day, and that the work being done was in violation of the laws and public policy of the state of Massachusetts. The court held that the work was not a work of necessity or charity, and that the plaintiff could not recover. The court uses this language:

> "The decisions in this Commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence. The cases upon this subject are reviewed in *Myers* v. *Meinrath*, 101 Mass., 366; *Hall* v. *Corcoran*, 107 Mass., 251, and *Cranson* v. *Goss*, 107 Mass., 439."

In

Gulf C. & S. F. Ry. Co. v. *Johnson*, 9 S. W., 602,

it appeared that the plaintiff was lessee of a building and that to this building the defendant had fastened a wire to secure a telegraph pole. By reason of this act, a brick wall was caused to fall, thereby injuring the property of plaintiff. The defendant pleaded that the plaintiff was at the time engaged in operating a gambling house and that the furniture and fixtures injured were appliances used in this unlawful business. The court held that a recovery was proper for the reason that it did not sufficiently appear that at the time of the injury the plaintiff was engaged in operating a gambling house. However, this language is used in the opinion:

> "We have been referred to no case identical in its facts with the case before us; but we think the principle upon which it rests has been elaborately discussed and considered with great care in many of

the American cases. It may be assumed, as undisputed doctrine, that no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he is a party. *Welch* v. *Wesson*, 6 Gray, 505. In the case *McGrath* v. *Merwin*, 112 Mass., 467, cited by appellant, the plaintiff was, at the time of the alleged injury, voluntarily engaged in an illegal act, and which contributed to his injury or damage, and was inseparably connected with it. *Myers* v. *Meinrath*, 101 Mass., 366, was a suit to enforce the performance of an illegal contract, the illegality of which precluded a recovery. *Connolly* v. *City of Boston*, 117 Mass., 64, was a suit to recover damages for personal injuries occurring while plaintiff was traveling on the Lord's day, and it was shown that the journey was not one of charity or necessity, and no recovery was allowed. *Kitchen* v. *Greenabaum*, 61 Mo., 110, was a suit by the plaintiff to recover $600 which a lottery ticket held by him had drawn, and which ticket defendant fraudulently induced him to transfer, concealing from plaintiff the fact that it had drawn such prize. The sale of such ticket was denounced by the laws of Missouri, and it was held that he could not recover."

In

Phalen et al. v. *Clark et al.*, 19 Conn., 421,

a case growing out of a suit with reference to a lottery ticket, this language is used:

"We suppose it to be a well-settled doctrine that if a plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover it."

In

Bosworth v. *Swansey*, 10 Metcalf, 363,

it was held that one who was traveling along a highway on the Sabbath day could not recover against the town-

ship by reason of a defect in the highway, this language being used:

> "The act of the plaintiff, therefore, in doing which the accident occurred, was plainly unlawful, unless he could bring himself within the excepted cases; and this would be a species of fault on his part which would bring him within the principle of the cases cited. It would show that his own unlawful act concurred in causing the damage complained of."

See also the exhaustive note to

James v. *Wellston Township*, 13 L. R. A. (N. S.), 1271.

These authorities, and many others which it is a mere matter of research to disclose and cite, show that there are very many respectable authorities in the United States and England, holding, just as the Mississippi court has held in the McLaurin case, that no one can recover from a tort feasor however great the negligence, provided the plaintiff, in proving his case, must establish his own unlawful act.

Effect of the Schuyler Case.

It will doubtless be argued, as it was argued in the motion to dismiss, that the case should be affirmed upon the authority of

Southern Pacific Co. v. *Schuyler*, 227 U. S., 601.

but this case, when carefully examined, quite obviously does not control the case at bar. To express the matter in the shortest possible way, the distinction between the Schuyler case and the case at bar rests upon the difference in the course of decision in the state of Utah and the state of Mississippi with respect to the right of recovery by a plaintiff who is himself engaged in an unlawful enterprise. That is to say, the Supreme Court

of Mississippi follows the rule that no one can recover for tort if, in the course of making his proof, it becomes necessary for him to show that he was himself violating the law. In Utah, on the other hand, the state courts have held that one who is violating the law may nevertheless recover provided he himself is acting in good faith. This distinction between the public policy of Mississippi, as declared by its Supreme Court in the McLaurin case, *supra*, and the public policy of Utah, as declared in the Schuyler case, 37 Utah, 581, makes all the difference in the world when this court comes to review the action of the Supreme Court of Mississippi in passing upon the federal statute involved. It was the contention of the railroad company in the Supreme Court of Mississippi that it ought not to be required to pay this judgment, because Messina was a lawbreaker at the time he received his injury. It so happened that the particular law which Messina was violating was a federal law, but none the less it was a law which Messina was bound to observe. It was a mere accident that the law happened to be a federal law. The result would have been the same if a state statute had been violated.

When the railroad company, plaintiff in error here, presented the view that Messina was a law breaker and could not therefore recover, the Supreme Court of Mississippi did not reply, as it perhaps might have done, that he could recover in spite of the fact that he was violating the law. The Mississippi Court seems to have recognized and to have agreed with plaintiffs in error that if Messina was violating the law his case was ended, but it said in effect that he was not violating the law. The Supreme Court of Mississippi construed the federal statute and held that no offense was involved in the act of making an interstate trip without paying fare. The importance of the case and the urgent insistence of de-

fendant in error that the Schuyler case controls warrant us in making a careful examination of the Schuyler case, with a view to determining just what bearing it has upon the instant case.

In the Schuyler case, it is shown that Schuyler was a mail clerk who held a commission from the government. This commission entitled him on its face to ride on the trains free, provided he rode in a mail car. The act of Congress, known as the Hepburn Act, was thought to prohibit the free transportation of a mail clerk unless the mail clerk was traveling on business for the government. This was the construction put upon the act by the Interstate Commerce Commission. Schuyler had made a purely personal journey from Ogden, Utah, to Oakland, California, and was injured while returning from Oakland to Ogden. It was settled by the state court that Schuyler, at the time of his injury, was not traveling on government business but was traveling on a purely personal mission. The Utah Court held in the first place that the act of Congress did not prohibit a mail clerk from riding as Schuyler was, and that he was entitled to free transportation even though he was not, at the itme of the injury, traveling on government business. As the Supreme Court of the United States remarked, this ruling of the Utah court presented a federal question (see page 610 of the opinion). But the Utah court went further. It held that, even conceding for the sake of the argument that Schuyler was violating the federal act, yet under the Utah law one could recover against a tort feasor even though he was himself violating the law, especially when it appeared, as it did in that case, that the plaintiff had been accepted as a passenger by the railroad company in good faith and since it appeared further that the plaintiff himself was acting in good faith in entering the car and making the trip in the sin-

cere belief that he was entitled to transportation. The Utah court pointed out at some length that the Act to Regulate Commerce had gone into effect only a short time before the injury; that its construction was not generally known or understood; that Schuyler never for a moment doubted that he had a right to make the trip; and that the railroad company was also of that opinion. The Utah court said therefore in effect that Schuyler in good faith submitted himself as a passenger and the railroad company in good faith accepted him as a passenger, there being in the mind of nobody any question of violating the law. "Under these circumstances," said the Utah court, "We settle it as a matter of state law that this man is entitled to a recovery." This was the attitude of the case when it reached the Supreme Court of the United States. What the Supreme Court decided in the Schuyler case was that it had no right to interfere with the local law of Utah and require the courts of Utah to say that one who is violating an act such as this is thereby precluded from recovery.

Mr. Justice Pitney points out in the opinion that the relation of carrier and passenger, in the case of gratuitous passage under circumstances such as existed in the Schuyler case, is a question of state law and not a question of federal law. That is to say, he recognizes that it is entirely within the competency of the local courts to say that one may recover even though he is violating the law. It is manifestly of no particular importance whether the law under review is a federal law or a state law, unless there is something in the federal law itself which contains a provision preventing recovery. The only thing that the Supreme Court of the United States decided was that the federal act was not of such a nature as to prevent recovery in spite of the rule in the state court which permits recovery by a per-

son found technically guilty of violating some law. The only thing decided in the Schuyler case is that the Hepburn law provides a penalty for its violation and this is the only punishment which the federal authorities can impose upon one who violates it. The Supreme Court says in effect in the Schuyler case that certain penalties are imposed by the Hepburn law for its violation, and that when these penalties are paid the federal authorities are satisfied. The language of the court is this:

> "As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn Act is such as to deprive one who in good faith and without fraud and with the consent of the carrier but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care."

The precise thing, and the only thing, decided in this case is that the Hepburn Law is not of such a character as to prevent a local court from holding that one who violates it does not necessarily thereby lose his right to damages. Several times in the opinion the court is at pains to say that there is nothing in the Hepburn Act which prevents the plaintiff from taking advantage of the local law.

The case at bar would be like the Schuyler case if the Mississippi court in its opinion had said that Messina could recover under the state law whether or not he was violating a federal law. The Mississippi court, however, did not, as did the Utah court, hold that a violation of law does not preclude recovery. It would indeed have been impossible for it to so hold without overruling the McLaurin case, *supra*, and there is no hint in this opin-

ion that the authority of the McLaurin case is in any way shaken.

It cannot be said that the Supreme Court has held that a man is entitled to recover even though violating a federal law regardless of the course of decision in the state. This court has decided nothing of the kind, and indeed would have no right to make such a decision. This is purely a state question and is left for the local courts to decide. This court has merely said that if the local courts have decided that a person violating the law can recover, there is nothing in the Hepburn Act which prevents the application of the local rule to a person engaged in violating that particular act.

But suppose the Supreme Court of Mississippi had said expressly, as in effect it has said, that, "according to our policy Messina could not recover if he were violating a federal act, but we hold he was not violating a federal act," would the Supreme Court of the United States say to the Mississippi Supreme Court "You have no right to say that one who is violating this act cannot as a matter of local law be prevented from recovery?" Obviously, this is a state question with which this court has nothing to do.

It may possibly be argued that the Mississippi Supreme Court has the right to overrule, or disregard, or qualify, or explain the McLaurin case and permit a recovery even though Messina was violating the federal act. This may may be true, but the Mississippi court has not intimated any intention so to do. This court can only judge of what the Mississippi court will do by the precedents which it has itself established. It is not for this court to anticipate that there will be a change in the course of decision in the State of Mississippi. It is sufficient for this court to conclude that the Mississippi

Supreme Court has misconstrued the federal act and to reverse the case for this reason.

THE QUESTION ARISING FROM THE APPLICATION TO THIS CASE OF SECTION 1985 OF THE MISSISSIPPI CODE.

Section 1985 of the Mississippi Code of 1906, as amended by the Act of March 6, 1912, Mississippi Laws of 1912, Chapter 215, page 290, reads as follows:

> "In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives, or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be *prima facie* evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employes of railroad corporations and of such other corporations, companies, partnerships and individuals."

The plaintiff in error does not contend that Section 1985 of the Mississippi Code properly applied is unconstitutional. We concede that this question is put to rest by the decision of this court in

Mobile, Jackson & K. C. R. R. Co. v. *Turnipseed*, 219 U. S., 35.

In that case it was held that Section 1985 was merely a rule of evidence and that it was within the competency of the legislature to prescribe a rule of evidence of this character without infringing upon the guaranties of the Federal Constitution. Our contention here, however, is that Section 1985 was not so applied by the

Mississippi courts; that it was given an effect other than a mere rule of evidence; that it was so applied under the peculiar facts of this case that it became not a rule of evidence but was used to create a presumption of liability; and indeed, was so applied as to deny to the plaintiff in error one of its substantial defenses. This court is ordinarily not concerned with the constitutionality or unconstitutionality of a particular statute unless it is so applied in the particular case as to deny to a citizen of the United States some of its rights under the Federal Constitution. It might well be that Section 1985 in one case would involve no violation of a federal right, while in another case it might be so applied by the state court as to involve a violation of the guaranties of the Fourteenth Amendment.

In the Turnipseed case, *supra*, Mr. Justice Lurton, as the organ of the court, after holding that this statute did no more than create a presumption of fact which was rebuttable, and which should yield to the proven facts of the case, held that it was not a denial of the equal protection of the law because it did not create a presumption of liability, its operation being merely to supply an inference of liability in the absence of other evidence contradicting such inference. The court guards this opinion, however, by this qualifying observation:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present this defense to the main fact thus presumed.

> If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

The court thereupon held that these principles had not been violated in the particular case under consideration and therefore no federal right had been denied to the railroad company in that case. If, however, it can be shown to the court that, in the instant case, this statute was so applied as to deny to the railroad company the right to make substantial defenses, it is clear that the court would reverse the case and hold that the statute had been improperly applied.

It is quite true that the Supreme Court of Mississippi, following the intimations in the Turnipseed Case, has held that Section 1985 is a mere rule of evidence and that it has no application in a case where all the facts are proven and where there is no room for inference and where nothing is left to be inferred from the fact that the injury was inflicted by a running train. We have no quarrel with the interpretation put upon this statute by the Supreme Court in other cases. Our contention, however, is that in this particular case the Supreme Court of Mississippi departed from its own rule and from the rule laid down by the Supreme Court of the United States in the Turnipseed case and reaffirmed by that court in the case of *Easterling Lumber Co.* v. *Pierce,* 235 U. S., 380. Had the Supreme Court applied in the instant case the rule which it laid down in the case of *Railroad Company* v. *Thornhill,* 63 Sou., 674 (not yet officially reported), and in the case of *Alabama Great Southern R. R. Co.* v. *Daniell,* 66 Sou. Rep., 730 (not yet

officially reported), we would have no reason to complain.

In the Daniell case, *supra*, it is well said that, when all the facts and circumstances have been ascertained, the *prima facie* statute, Section 1985, ceases to perform any function and that the case, after full disclosure of all the facts, should be decided not upon the presumptions in the statute but upon the proven facts in the case. Substantially to the same effect is the Thornhill case, *supra*. Had these rules been applied to the instant case, certainly the statute would have presented no instance of an application which would infringe upon the railroad company's constitutional rights under the Fourteenth Amendment. But the difficulty here is that the statute was not so applied. A careful reading of the opinion of the Mississippi court shows that a number of errors were committed on the trial, but the court held that these errors were not sufficient to reverse the case. It is apparent from a reading of the opinion that this case was not a proper one for the application of Section 1985. The Supreme Court of Mississippi, as we have just pointed out, has repeatedly held that, where all the facts and circumstances are disclosed, then the presumption created by the statute must yield to the facts proven in the case and has no application. In this case the court says (Tr., 143):

> "There is no material conflict in the evidence except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer."

That is to say, the evidence fully disclosed precisely how the train was being run, at what rate of speed, under what circumstances, etc. The only point of serious dispute, according to the finding of the Mississippi court, was as to the knowledge of the engineer in regard to

Messina's presence on the train. This was, therefore, a case in which the *prima facie* statute clearly had no application and in which it performed no function. Yet we find by examining instruction No. 44 (Tr., 18) that the *prima facie* statute was invoked and was invoked in such a peculiar way as to cut off the railroad company from one of its important defenses, as we shall presently more particularly point out. At this time we make the point that, since all the facts and circumstances surrounding the operation of the train had been proven, it was error to invoke the statute at all. This is practically admitted by the Mississippi court, yet it was held that the case was of such a nature that the error was not a reversible error. We are, however, confronted with a case in which error was committed by injecting the *prima facie* statute when, under the decisions of the Mississippi court in the Thornhill case and the Daniell case, there should have been no such injection of the statute into this case. The court will be interested in examining this Daniell case, since it appears in that case that the Supreme Court held that it was error to invoke the *prima facie* statute in view of the fact that all the facts and circumstances had been proven and this error in the Daniell case was sufficient to reverse. The court in that case very properly said that it was reversible error to invoke the statute in a case where it had no application and where the railroad company had presented proof showing all the circumstances surrounding the injury. Yet, in the instant case, which was a most flagrant instance of a violation of this rule, the court refused to hold that the error was reversible.

Not only did the court refuse to follow its own rule in the particular mentioned, but this fourth instruction is demonstrably erroneous in another particular, and this error is of such a nature as to prevent the railroad com-

pany from presenting its most important defense. Wh
the instruction is carefully examined, it is seen that
not only invokes the *prima facie* statute in a case whe
the statute, by the decisions of the Supreme Court
Mississippi, has no application, but it invokes it in su
a way and in such language as to prevent the defen
ant railroad company from ever submitting to the ju
what was the most important question of fact in th
case, that is to say, the knowledge of the engineer as
the presence of Messina on the train. It will be remem
bered that the Mississippi Supreme Court points out tha
the engineer denied he had any knowledge that Messi
was on the train, and the Mississippi court further hol
that, if the engineer did not know of Messina's presenc
there could be no recovery. The Mississippi court hel
however, that this question of fact was submitted to th
jury. It is our contention here that this instruction N
44 prevented the submission of this particular questio
to the jury. Let us see if it did not.

The instruction begins thus:

> "You are instructed that the plaintiff was injure
> by the running of defendants' train, and that there
> fore the defendant is presumed to have been negli
> gent, and the burden is upon the defendant to sho
> to you by satisfactory evidence that it was no
> liable, and by the same evidence to exonerate itsel
> from blame."

So much of the instruction amounts, perhaps, to n
more than the invocation of the *prima facie* statute in
case where it should not be applied, since all the facts
and circumstances were fully disclosed by the proof. The
Daniell case, *supra*. But the next sentence is the on
which does the mischief and about which we complain
particularly in this connection, since it cuts the railroad
company off from one of its most important defenses.
This language is used in the instruction:

> "If all the evidence leaves it doubtful, or a matter of conjecture as to how the train was being run by the defendant's servants in charge of it, then the defendant has not met the burden, and it is your duty to find for plaintiff full damages, etc.,"

the rest of the instruction being addressed to the measure of damages. How can it be said that the jury ever gets to the consideration of the question as to whether the engineer knew of Messina's presence on the tender? This instruction charges the jury that, if the evidence leaves it doubtful as to how the train was being run, there must be a verdict for the plaintiff. The important and vital issue in this case as to the knowledge of the engineer is put to one side, and the jury is in effect instructed that it has no bearing on this case. This issue had nothing to do with the running of the train. It is an issue entirely outside of the question of the negligence of the railroad company. The railroad company might be ever so negligent and under the very finding of the Supreme Court in this case there would be no liability if the engineer was ignorant of Messina's presence. Yet the jury is instructed here not simply that the proof of injury is sufficient to warrant a finding of negligence on the part of the railroad company, but that proof of injury by running trains is sufficient to find a verdict, utterly ignoring the question as to the engineer's knowledge of Messina's presence. It is easy to understand that a jury with this instruction before it, and being charged by the court that if the evidence leaves it doubtful as to how the train was being run they should find for the plaintiff, would be justified in bringing in a verdict without ever reaching the question as to the engineer's knowledge. It may be said, however, that this is an argument which we should have addressed to the state court, and that this court is not concerned with the question. But it must be remembered that if this

prima facie statute, which we are here considering, is so applied as to make it more than a rule of evidence and so applied as to cut the defendant off from one of its substantial defenses, it then does become a federal question since the statute so applied in the particular case operates to deprive the defendant of its property without due process of law and to deny to it the equal protection of the law. The statute is directed, of course, principally against railroad and other companies and individuals engaged in operating dangerous agencies. This has been held to be a proper classification, and it has been said that, if the *prima facie* statute, so-called, does no more than to require an individual or corporation operating these dangerous agencies to produce evidence as to how the accident happened, then it is no denial of due process and no denial of equal protection of the law, since, as observed, the classification is reasonable and the rule amounts to no more than a rule of evidence. But if this *prima facie* statute is to be so applied as to cut the defendant off from a perfectly valid defense which has no connection whatever with the operation of the train, then it becomes far more than a rule of evidence and becomes a rule of liability which has no reasonable relation to the question of dangerous agencies, this underlying, of course, the holding that the classification is proper. This rule of evidence, be it observed, is a rule which the court may adopt in order to throw light upon the question of whether the railroad company is negligent in the operation of its trains. Negligence is presumed from the fact of the injury. But the railroad company should not by an improper application of the statute, be required to respond in damages where it has a defense which is sufficient to destroy the plaintiff's claim, even though the defendant be found to be negligent.

It is said, however, that this question of the knowledge of the engineer was submitted to the jury in other instructions and that therefore the fourth instruction is harmless even though erroneous. There is only one other instruction on the subject which could possibly be construed as submitting this question to the jury. That is instruction No. 2 found on pages 15 and 16 of the Transcript. That instruction is not upon the *prima facie* statute. In this instruction, it is true, reference is made to the knowledge on the part of the engineer of Messina's presence on the train, but that reference is not prominent, and what is controlling here, it is a general instruction having no reference to this rule of evidence provided in Section 1985 of the Code.

It is easy to imagine that a jury, taking the whole body of instructions, would first read instruction No. 2, laying down the general principles which should control recovery. But when it gets to instruction No. 4, it is found that the court applies a statute having a special and particular application, and the jury finds that, under this statute, it is the law that, if the evidence leaves it doubtful as to how the train was being run, there should be a verdict for the plaintiff. This, in spite of the previous general instruction which makes some reference to the engineer's knowledge. In other words, this second instruction deals with what the plaintiff must prove. The fourth instruction, however, deals with the method by which this proof can be made. It is said in the second instruction that the jury must believe from the evidence that the plaintiff was an employe; that he was riding on the train with the knowledge of the engineer; and that the train was run in a reckless, wilful and wanton manner. This is what the jury must believe before it can find a verdict. But the fourth instruction advises

then that, if the evidence leaves it doubtful as to how the train was being run, this is sufficient basis for them to believe all the facts set out in the second instruction and necessary to find a verdict. They must, of course, find the facts in the second instruction, but the fourth instruction informs them that, in view of this *prima facie* statute, they may find all the facts required by the second instruction merely by finding that the evidence has left it doubtful as to the manner in which the train was operated. This being certainly the effect of the court's instructions, it is quite clear that the *prima facie* statute has by the court been so applied as to deprive the railroad company of its defense on the merits and that it has been denied in this way due process of law and the equal protection of the laws.

There is another vice in this fourth instruction which is quite obvious. The language used is that, if the evidence leaves it doubtful or a matter of conjecture as to how the train was being run, etc. This is a stronger burden placed upon the defendant than rests upon the state in a criminal case. The instruction does not even say that the doubt must be a reasonable one. It is said that there must be a verdict for the plaintiff if the evidence leaves it doubtful. The error of this form of instruction is clearly demonstrated by the opinion of the Mississippi Supreme Court in a previous case. See

Gentry v. *Gulf & Ship Island R. Co.*, 67 Sou., 849 (not yet officially reported).

In that case, which did not arise under the *prima facie* statute, an instruction was given at the instance of the defendant railroad company to the effect that, if the jury is in doubt as to whether plaintiff was injured or not in the derailment of the train, and this doubt cannot be removed by a clear preponderance of the evidence,

the verdict should be for the defendant. The court uses this language in reversing the case:

> "This instruction imposes on a plaintiff a greater burden than the law imposes on the state in a criminal trial. In a criminal trial the state must prove its case beyond all *reasonable* doubt. By this instruction the plaintiff must remove *all* doubt from the minds of the jury—and that is not all; the plaintiff must remove *all* doubt—'by a *clear preponderance* of the evidence.' The plaintiff must establish his right to recover by a preponderance of the evidence. Whenever the jury is satisfied that the plaintiff has proven his case, the plaintiff is entitled to recover. The law imposes on the plaintiff no burden to remove all doubts from the minds of the jury.
>
> This instruction is misleading, and calculated to do much harm. Lawsuits must be tried under reasonable rules and regulations. It is reasonable to require the party who asks relief to satisfy the jury that he is entitled to it. It is unreasonable to require the plaintiff to remove all doubts which may find lodgment in the brain of some skeptical juror. This instruction, and others in this record, cast on the plaintiff this burden."

Here the Mississippi court very properly reversed a case which had been decided in favor of the defendant on the ground that an instruction which required a verdict for the defendant if the evidence was doubtful, was not only erroneous but constituted reversible error. But in the instant case we are told that the burden is upon the defendant to show that the train was not negligently run and that if the evidence left it doubtful, etc. Any doubt is sufficient. It need not be a reasonable doubt, or a doubt for which a reason can be given, or a doubt based upon any reasonable ground. Unless all doubt is removed by the defendant railroad company, there must be a recovery. We respectfully submit that it is not the equal protection of the law to take a statute applicable

only in civil cases and so apply it as to subject the defendant to a burden greater than that carried by the state in a criminal case. If it be a reasonable classification to require corporations and individuals operating dangerous agencies to produce evidence as to how the accident happened, does that fact authorize the court to go further and say to this class of litigants, "You must not only show how the accident happened and relieve yourself from blame, but you must remove all doubt from the minds of the jury. We take you out of the class of all other litigants in civil cases and subject you to the necessity for producing a degree of certainty in the proof which is even more severe than is imposed upon the state for the protection of its citizens in the trial of criminal causes." This is not to apply the statute simply as a rule of evidence, it is to subject defendants to whom it applies to an unfair and unjust rule of liability and to make it impossible for the defendants to escape liability provided a juror can be found whose mind is of such an order as that there should be lingering doubts upon the question of negligence.

It will be observed that, in this case, the Supreme Court of Mississippi found that this instruction was erroneous, and the court admits (see page 143 of the transcript) that this language places a greater burden upon the defendant than the law requires it to sustain. Why should an error of this kind be sufficient to reverse a case at the instance of the plaintiff (the Gentry case, *supra*), and the court hold that the same effect is not brought about in the case of the defendant's appeal?

Conclusion.

We submit, therefore, that upon both the grounds urged, the Supreme Court of Mississippi has fallen into error in respect to federal questions and that the case should be remanded for further proceedings not inconsistent with the views of this court.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 535

ILLINOIS CENTRAL RAILROAD COMPANY *et al.*,
Plaintiffs in Error,

vs.

V. P. MESSINA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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ERRORS IN STATEMENT OF THE CASE.

In the brief of defendant in error, counsel for the defendant in error undertakes to state the facts of this case in the opening part of his brief, but, as we contend, the facts have been stated, if not erroneously, yet in such a manner as to give a decidedly wrong impression of the merits of this controversy.

It is stated that defendant in error was a switchman of the plaintiff not on duty at the time of the injury. If by this it is meant to say that Messina was an em-

ploye at the time of his injury, the statement is not a
curate. As we pointed out in our original brief, Me
sina had been at one time an employe of the railroa
company, but had severed his connection with the co
pany by abandoning his place of employment witho
securing the permission of his superior, as the rules
the company required. Nor did the Supreme Court
Mississippi, in its decision, find that Messina was a
employe at the time of the injury. The language of t
court is:

> "The evidence for plaintiff discloses that plainti
> had been employed by the railroad company as
> switchman, etc." (Tr., 142.)

It is stated in the brief, to which this is a reply, tha
the engineer of the locomotive ran his train into wate
which was waist deep. The testimony hardly warrant
the statement that the water was waist deep over th
track. Doubtless, counsel bases his statement upon th
testimony of the witness Cole, one of the men ridin
on the tender of the locomotive, who states that afte
the tender turned over he found himself in water wais
deep. (Tr., 44.) To the same effect substantially i
the testimony of the witness Boone, another one of th
trespassers involved in the accident, who states that th
water was waist deep at the point where the engine wa
lying after it turned over. (Tr., 52.) This means n
more than that the water was waist deep on the side o
the railroad, but it by no means follows that there wa
this depth of water over the track, since it is a matter o
common knowledge that a railroad track is almost in
variably elevated above the prevailing level. The effec
of the statement that the water was this deep over th
track is to exaggerate the negligence of the engineer.

It is further stated in the brief for defendant in er
ror that Messina was permitted to lie in his wounded

condition with broken limbs and torn flesh until nearly noon of the day of the injury without any medical aid. The purpose of this statement is to indicate that the company had violated the humanity rule in regard to the care and attention which should be given to a wounded person. But this statement is quite inaccurate. The defendant in error, Messina, admits that some one who said he was a doctor bound up his leg shortly after the accident and very soon after he had been removed to the baggage car. (Tr., 71.)

Dr. Baskerville, a physician at Winona, Mississippi, who examined Messina soon after the wreck, testifies as follows:

"Q. What was the condition of Mr. Messina, as to whether he had been treated by a physician and surgeon up to that time?

A. Yes, sir; he had been treated.

Q. Please explain how you know that?

A. He was on a mattress and his wounds had been dressed and bandaged." (Tr., 102.)

Dr. Barksdale states the matter thus:

"Q. What did you find?

A. I found the condition of the wreck and found who was injured.

Q. Where was Messina?

A. He had been moved back in the baggage car, and I found that his wounds had been dressed and bandaged." (Tr., 109.)

The conductor of the train, Mr. Woods, thus indicates what efforts were made to relieve Messina's sufferings:

"Q. Please state if there was anyone injured there, and if so where you first learned of it?

A. As soon as I got to the baggage car, I heard some one holler as if in distress, and I knew some one was hurt.

Q. What did you do?

A. I went back to the sleeper and got two pillows, a mattress, some blankets and four or five sheets, and had them brought to the baggage car, and they

brought a man in there, whom I learned afterwards was Messina.

Q. Where did you meet them bringing him in?
A. At the door, I helped bring him in.
Q. What was done for him?
A. We made him as comfortable as possible, and we sent and got some whiskey, and gave it to him." (Tr., 118.)

Mr. Cameron, the baggage master, thus testifies:

"Q. Do you know this young man here, Mr. Messina?
A. No, sir.
Q. Please state if you saw him that night?
A. Yes, sir.
Q. Do you remember who brought him in the car, and where were you standing when he was put in the door?
A. I helped to take him in.
Q. What assistance did you render?
A. I did all I could.
Q. What did you do?
A. I went through the train to get some water and whiskey for him, and to see if I could find a doctor, and I did find a doctor and brought him back there.
Q. What did this doctor do?
A. I don't know, sir." (Tr., 122.)

We thus see that it is fully established that the train crew were attentive to this injured man, placed him in the baggage car, furnished him with bedding, securing the services of a doctor who happened to be a passenger on the train, and that this doctor gave him such medical attention as was possible under the circumstances. It is, therefore, absolutely a mistake to say that he was not given such medical attention as his wounds deserved.

It should be stated further that there is a sharp conflict in the testimony as to the time when Messina was removed to the hospital at Winona. The testimony shows that other persons who had not been made as com-

fortable as Messina were removed first to the hospital and that Messina was taken there as soon as it was possible to secure proper means of conveyance.

It is equally incorrect to say, as is said in the brief for defendant in error, that Messina was subjected to gross abuse and insult by any agent of the plaintiff in error. It is true that Messina on his first examination undertakes to say that he was cursed and abused by the baggage master (Tr., 61), but his statement in this respect was so thoroughly discredited that no one could possibly believe that the baggage master or any other employe of the company used any abusive language to the defendant in error. Mr. Cameron was the baggage master, and he testifies that he used no such language (Tr., 122), and in fact all the witnesses agreed that Mr. Cameron was a gentleman who never used any profanity at all. The impression made upon the jury by Mr. Cameron's emphatic denial was evidently such as to make it clear that Messina had not testified truthfully in regard to this phase of the matter, and he was put back on the witness stand upon this point. He testifies that the man who cursed him was not Mr. Cameron but somebody in another car. (Tr., 136.) It is, therefore, clear that if Messina was cursed at all, which is exceedingly doubtful, it was by some one other than an employe of the railroad company. There is no testimony in the record to indicate that the man who abused Messina had anything to do with the railroad company or the company's business. Indeed, a careful reading of the opinion of the Supreme Court of Mississippi shows that the court attached no importance to this evidence of neglect and abuse after the injury, and the recovery does not rest at all upon any theory that Messina was entitled to recover on account of the treatment

which he received at the hands of the company after the wreck. The recovery is based entirely upon the alleged gross negligence of the engineer in running his train.

We have been at some pains to point out these errors in the statement of facts for the reason that it would appear that counsel for defendant in error seeks to justify one of the most remarkable verdicts that ever has been rendered in the history of American jurisprudence. We are justified in making this statement when it is remembered that the court has permitted a recovery in the amount of ten thousand dollars for injuries to an admitted trespasser, stealing a ride upon the tank of an engine upon no greater proof than that the train was run too rapidly after warning of high water conditions. This warning, it should be remembered, was contained in the telegram:

> "No. 5 reports water high between Beatty and Sawyer. Have had very hard rains in there past three hours. Water over track, but no damage reported Sawyer."

The telegram does not indicate just where the high water was, but does indicate that somewhere between Beatty and Sawyer high water conditions were to be expected. The engineer testifies that he was using care; that the track was in good condition, and that he did not expect trouble at this particular point. When it is remembered that the engineer was between the defendant in error and the point of danger and that his position placed him in a more perilous situation than was Messina, it is extremely difficult to understand how the Mississippi court could have found that the engineer was guilty of such wilful, wanton and reckless negligence as to justify a recovery at the hands of a man who had no right whatever upon the train.

We think this case is without a parallel in the history of personal injury litigation.

THE RULING OF THE MISSISSIPPI COURT INTERPRETING THE ANTI-PASS PROVISION OF THE INTERSTATE COMMERCE ACT.

Counsel for defendant in error gravely argues that the Mississippi court correctly held that Messina, at the time of his injury, was not violating any provision of the federal law. The contention is made with some apparent seriousness, that the Act to Regulate Commerce was not directed against persons who obtained a free ride with the knowledge and consent of the persons in charge of the train, but was only directed against those who might secure passes from such officers of the railroad as are authorized to issue passes. Counsel attempts to draw some distinction between passengers and trespassers in this respect. The argument seems to go upon the theory that if a man obtains a pass unlawfully, he is a passenger, but that if he rides on a train without a pass he is a trespasser and that the act is directed against so-called passengers and not against trespassers.

It is said that it was the purpose of Congress to prevent the extension of favors to shippers, politicians, and persons with influence. The inference is that if a tramp steals a ride upon a train he is not guilty of violating the federal law, because he is probably not a shipper or a person who could owe the company anything in return, either in the way of business or political influence. It would seem, therefore, that if counsel for defendant in error is correct, the distinction between a lawful free ride and an unlawful free ride depends upon the ability of the person securing the ride to confer some favor upon the railroad. Manifestly, this is unsound, and such an interpretation would destroy the purpose of the act,

which was to require all persons to pay the same amount for interstate transportation.

Counsel lays some stress upon the language of the act which provides that no common carrier shall issue or give any interstate free ticket, free pass or free transportation for *passengers;* but he altogether overlooks or ignores that provision of the act quoted in our original brief, which provides:

> "Any *person,* other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty."

If counsel is correct in his contention that a pass must be issued, it would seem that the words "free transportation" in the clause above quoted are without meaning.

Nor is counsel correct in saying that no case can be found other than the one at bar, in which this point has been considered and decided. In our original brief, we called attention to the case of

> *Spencer et al.* v. *C. M. & St. P. Ry. Co.,* 154 N. W. (Wis.), 979,

printed in the advance sheets of the North Western Reporter issued December 17th, 1915. In this case it appeared that young Spencer was permitted by the engineer to ride in the cab of the engine. The crown sheet of the firebox burst, causing steam to escape into the cab, resulting in young Spencer's death. The court uses this language:

> "Under the law of the United States, Chapter 309, Act of June 18, 1910, it was unlawful for the deceased to ride free and unlawful for defendant to permit him to so ride. A violation of the federal act by the defendant, or by anyone permitted by it to ride free, would be a punishable offense."

Again it is said:

> "In the present state of the law, absolutely making such conduct as the deceased was guilty of a punishable offense, it does not seem that there is any basis in the evidence in this case for holding that he was a licensee. He must be presumed to have known that in doing as he did, he was where he had no right to be and was there in violation of law."

Here is an express adjudication by the Supreme Court of Wisconsin that one who obtains a free ride in substantially the same manner as did Messina violates the Federal Act. No other holding, indeed, seems to be possible, for, as pointed out in our original brief, if the act is to be construed as permitting persons to ride on a train without a pass, the provisions of the Interstate Commerce law are absolutely nullified. It would be the easiest thing in the world for a railroad company to sanction the practice of permitting anybody whom it desired to favor to ride without a pass on a freight train or on any part of a passenger train where such a person could be made fairly comfortable. Counsel seems to think that if it is declared to be the law that a trespasser violates the Federal Act by securing this form of transportation, the railroad company would likewise be guilty of a violation of the law. This might or might not follow. If the conductor, or engineer, contrary to his instructions and the rules of the company, permits a man to ride free, it might very well be held that, in doing so, he was acting outside of the scope of his authority and criminal liability might not be fastened upon the master by reason of this unauthorized act of its employe. But it would by no means follow that the person who secures the free transportation would for that reason be exempt from the penalties of the law. The law punishes the securing of free transportation as well as the granting

of free transportation. It undertakes to say that no one shall make an interstate journey without having paid the lawfully published rate. Whether he rides on the tender of the engine or in a passenger coach or on a freight train with or without a pass can make no difference. We agree thus far with counsel, that the statute is so plain that it is difficult to make an argument which will make the point any clearer than the statute has made it.

There is no force in the argument that if there had been a person upon the tank of the engine who was making an intrastate journey he would have been permitted to recover, while an interstate traveler would have been denied the right to recover. If the state law of Mississippi permits free transportation when the journey is intrastate, this can have no bearing whatever upon the question of the legality of making an interstate journey. One who undertakes an interstate journey violates the federal law, and if another does not violate any law because the journey is not interstate, no absurdity or incongruity of any kind is involved in permitting one to recover and denying the same privilege to another.

We submit that upon every consideration governing the interpretation and application of statutes, it must be held that the Mississippi court fell into grievous error when it construed the Federal Act as having no application to a person who was stealing a ride or was riding with the permission of the engineer, merely because no "pass" had been issued by the railroad company. We think this is the ground of the Mississippi court's decision.

IS THE ERROR OF THE MISSISSIPPI COURT IN THIS CASE REVERSIBLE ERROR?

Counsel devotes the greater part of his brief upon the point under consideration in an effort to show that, even though the Mississippi court has fallen into error in construing the federal statute, the case should be affirmed, because this error was not harmful. This contention is based upon the supposition that the Mississippi court would have held that even if Messina was violating a federal statute he could recover. It is, of course, impossible to say just what would have been the holding of the Mississippi court upon this point. As pointed out in our original brief, the argument was made in the Supreme Court of Mississippi that Messina was violating a federal statute and was, therefore, precluded from recovering, since, as it was contended, it is the jurisprudence of Mississippi that no one can recover in any action if, in the course of making his proof, it is necessary for him to show that he was violating the law. The Mississippi court did not overrule this contention. It answered it by saying that Messina was not violating a law. It is now argued that even if the Mississippi court had held that Messina was violating the federal statute, it would have gone on further and said that he could recover in spite of this fact, but no one can say that this would have been the ruling of the Mississippi court. As pointed out in our brief, the indications are all to the contrary.

We cited in our original brief the case of

Western Union Telegraph Co. v. *McLaurin,* 66 Sou. Rep., 739.

Counsel undertakes to distinguish the McLaurin case from the case at bar, but there is a total failure, as it seems to us, correctly to apprehend the real basis of de-

cision in the McLaurin case. It is contended that in the McLaurin case the wrongdoing of McLaurin was so connected with his cause of action against the Telegraph Company that the principle is different from the case at bar, because it is said that in the case at bar the violation of law is separate and independent of the act of the plaintiff in error in causing the injury. But this view fails to apprehend the real basis of decision in the McLaurin case.

It was conceded in that case that there could be no recovery of actual damages, but the court held that the conduct of the Telegraph Company was so negligent as to warrant the imposition of punitive damages. The act of the defendant, so the report says, was a confessedly wanton act, and one which under other circumstances would permit the imposition of punitive damages. The court points out that merely because no actual damages were suffered by the plaintiff, McLaurin, this fact does not prevent the imposition of punitive damages, which are imposed for the purpose of punishing the wrongdoer. The court, however, refused any allowance of damages upon the following considerations:

> "If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him. It has been said that the objection may often sound very ill in the mouth of the defendant, but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties."

Again it is said:

> "The plaintiff cannot travel to actual damages without the aid of his immoral acts, and it is the policy of the state to deny the plaintiff the assistance of the courts for the recovery of such damages."

The court then goes on to say that the same principle must apply to punitive damages, for it is said:

> "The publication of the telegrams did not disclose the character of the sender. It was necessary for the plaintiff's case that he should disclose her business (if this is the proper word for this sort of traffic), in order that he might thereby show that he was injured. He could not 'open his case' without confessing his criminal intimacy with the courtesan."

Again it is said, in connection with the question of imposing punitive damages:

> "The state will not undertake to punish the wrong because the plaintiff, who brings the controversy into court, comes with unclean hands."

It is, therefore, clear that the court in the McLaurin case rests its decision upon the proposition that no plaintiff will be permitted to recover if, in the course of making his proof, it is necessary for him to show that he himself was violating the law.

Now, we submit that Messina, in the case at bar, could not possibly establish his case without proving that he was on the train, making a journey from Canton to Memphis with or without the permission of the engineer, and was, therefore, violating the law. There can be no doubt that the case falls precisely under the principle of the McLaurin case. The cause of action in the case at bar is no more separate and distinct from the defendant in error's violation of the law than was the McLaurin case from McLaurin's violation of the moral code.

Counsel refers to the case of *Conithan* v. *Insurance Co.*, 91 Miss., 386, for the purpose of showing that the Mississippi court has adopted a rule which permits recovery in the case of one violating the law. But that case announces no doctrine which is at all at variance with the rule of the McLaurin case, nor does it run counter

with our contention in the case at bar as to what the Mississippi law is. The Conithan case was a suit upon a fire insurance policy. It appeared that the plaintiff had insured her household furniture and that she was engaged in carrying on an unlawful business. The court held, however, that there was no connection between the business which she was carrying on and the contract of insurance. This, be it remembered, was a suit upon a contract. The contract was perfectly valid, and it was held that this contract should not be held void merely because the owner of the property put it to an unlawful use. What is significant here, and in fact that which absolutely distinguishes this case from the McLaurin case as well as from the case at bar is that it was not necessary for the plaintiff, Conithan, to show her own iniquity in establishing her right of action against the Insurance Company. She was suing upon an insurance policy, and all that was necessary for her to do to prove her case was for her to produce the insurance policy and to prove her loss. The immoral business of the plaintiff could be shown only by the defendant as a defense in the suit. But in the McLaurin case, and in the case at bar, which are alike in this respect, the plaintiff must, in opening his case, prove his own violation of the law. The Conithan case is entirely in harmony with the underlying principle of the McLaurin case. If we look at that part of the opinion quoted in the brief of defendant in error, the distinction is clear. The court says that the insurance contract was not necessary in order to enable appellant to conduct her unlawful business. But, certainly, Messina would not have been injured if he had not been violating the law, for the proof all shows that if he had been riding in the passenger coach, no injury whatever would have resulted. Again, the court says in the Conithan case that the contract of insurance did

not in any way advance her interest in the business or encourage it; that she would have carried on this business just as well without the insurance policy as with it. But, manifestly, Messina would not have been injured and would have had no right of action here if he had not been violating the law. But the real point of distinction is, as pointed out, that in the Conithan case it was not necessary for the plaintiff to confess her own iniquity in opening and proving her case.

Counsel diligently cites a number of cases outside of Mississippi to show that it is the general rule of law that one may recover in spite of the fact that he is engaged in some unlawful enterprise. As we said in our original brief, we have never doubted that cases of this kind could be found, but it is to be observed that none of these cases are Mississippi cases. And this further observation is pertinent, that in practically all of these cases there is a full recognition of the fact that there is a conflict of authority upon the question. What counsel has done is to select cases from that line of authority which holds that there can be a recovery in spite of the fact that the plaintiff is violating the law. In our original brief, we produce cases from other courts holding to the contrary. Our contention is that Mississippi has allied itself with that line of authorities holding that no one can recover either actual or punitive damages regardless of the negligence of the defendant, provided he must prove his own violation of law in order to establish his case.

Counsel cites the well known case of *D. L. & W. R. R. Co.* v. *Troutwein*, 7 L. R. A., 435. This case deals with the right of a passenger to recover for negligence when he was traveling on Sunday. The court recognizes the fact that elsewhere the rule is different, for it is said:

"In Massachusetts, Maine and Vermont, it has

been held adversely to the legal proposition adop
by the trial judge."

Our contention here is that Mississippi is in acc
with the views announced by the Maine, Massachuse
Texas and Connecticut courts.

Reference is made to the case of *Carroll* v. *Staten land R. R. Co.*, a New York case, reported in 17 Am Rep., 221, but on page 228 of this opinion it is said:

> "The courts of Massachusetts and Maine, a
> perhaps, of some other states, have taken a differ
> view,"

thus recognizing that there is no unanimity of decision the point.

The case of *Opsahl* v. *Judd*, 14 N. W., 575, referred by defendant in error in his brief, merely refers to earlier case of *Jacobus* v. *Railroad Co.*, 20 Minn., 1 also reported in 18 Am. Rep., 360. A reference to t case will show that it was a case of a passenger ridi upon a free pass, long before there was any legislati on the subject. It, therefore, deals rather with question of injuries to a licensee permitted to stay the train by the conductor without any violation of law being involved. However, we will admit for sake of the argument that the Minnesota court is in cord with the courts of New Jersey and New York, holding that one is not necessarily prevented from rec ering on account of violating the law. Such an adm sion in no way weakens our argument.

We are perfectly willing to admit, further, that W son, in his work on Damages for Personal Injuries, cri cises the rule which the Mississippi court, as we co tend, has adopted, but he, nevertheless, recognizes t fact that such a rule exists, for he points out, in Secti 241 of his work, that in Maine, Massachusetts and Ve mont, the rule is recognized that no one can recov

damages if he is himself engaged in violating the law. The author thinks that these decisions are wrong, but that is entirely outside of our province to consider here. This court has no authority to overrule the courts of the states upon a purely state question like this.

So, we say, that in the case of *Sutton* v. *Wauwatosa*, 9 Amer. Rep., 534, it was recognized that the rule there announced by the Wisconsin court was not in harmony with all the cases in other states. This decision by the Wisconsin court reviews authorities from other jurisdistions and declines to follow them. At least five cases are reviewed by the Wisconsin court, all of them holding, as was held by the Mississippi court in the McLaurin case.

Reference is made to the case of *John* v. *Northern Pacific Ry. Co.*, 32 L. R. A. (N. S.), 85, but a careful examination of this case would seem to indicate that under the statutes of Montana the passenger was not himself violating the law, though, perhaps, the carrier was.

It can scarcely be said that the case of *Philadelphia & R. Co.* v. *Derby*, 14 How., 502, a case decided by this court, is any authority for the view that the Supreme Court of the United States, if free to decide the question, would hold that one who is violating the law can recover in spite of the fact that he must prove his own wrong in establishing his case. That case is upon quite a different state of facts.

We deem it unprofitable to restate, or to state in a different form, our contention in regard to the *Schuyler case*. Counsel for defendant in error insists that the Schuyler case is determinative of the case at bar, but we have argued the proposition to poor purposes if the court concludes that the Schuyler case has any real bearing upon this question. Even if it be conceded that the Schuyler case indicates what would be the ruling of the

Supreme Court on a question which it was free to pass upon, yet this militates not at all against our contention here, that no one would for a moment suppose that the question of what is the effect of Messina's violating the law upon his right of recovery is anything else but a state question. This court has no right to interfere with the Mississippi court's views on this subject. As we pointed out in our original brief, the Schuyler case merely holds that there is nothing in the Federal Act which prevents a state court from allowing a recovery if it sees proper to do so. The decision leaves the state court absolutely at liberty to permit recovery or deny recovery according as it may decide the question as to the effect upon the plaintiff's rights of his being engaged in an unlawful enterprise at the time of his injury. We may concede for the purpose of the argument that every court in the United States, including this court, has held that a man may recover even though he is a lawbreaker without in the slightest degree impairing the validity of our argument, since that argument is based upon the proposition that the Mississippi court has decided the local question in favor of our contention.

FURTHER DISCUSSION OF THE EFFECT OF THE ERRONEOUS DECISION BY THE MISSISSIPPI COURT.

We contend, further, that if the law of Mississippi is left in a doubtful condition as to the effect upon the defendant in error's right to recover of his being engaged in violating the law, it is the duty of this court to reverse, for the Mississippi court's decision rests upon the proposition that the federal law was not being violated. It rests upon no other independent ground. If the Mississippi court had said that the federal law was not being violated, but had gone on further, as did the Utah court in the Schuyler case, and held that even

if it was violated Messina could recover, quite a different question would be presented; but the Mississippi court nowhere intimates that it would hold that he could recover in spite of the fact that he was transgressing the law. All the inferences indicate that the holding would be to the contrary. This court will not concern itself with puzzling out what probably would be the decision of the state court. Of course, if the state court had clearly announced in other cases that it would make no difference as to the right of recovery whether or not the law was being violated, this court might regard the erroneous decision on the federal question as harmless, and not constituting reversible error; but it must clearly appear by the course of decision in the state that the erroneous ruling on the federal question was harmless before this court is justified in affirming it. The error of the Mississippi court must clearly be an immaterial error before it will be passed over and disregarded by this court. Thus, it has been said:

> "If the record disclosed no other error, the admission of this evidence might have been passed by as immaterial. Still it is impossible to say that the defendant's case was not injuriously affected by the admission of the evidence, and, while an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting. *Deery* v. *Cray*, 5 Wall., 795, 807; *Gilmer* v. *Higley*, 110 U. S., 47."
>
> *Boston & Albany R. R.* v. *O'Reilly*, 158 U. S., 334.

See, also:

Vicksburg & Meridian R. R. Co. v. *O'Brien*, 119 U. S., 99.

An exceptionally clear statement of the duty of the court in cases involving appeals from a state court, where the federal question has been erroneously decided, is found in the case of

Murdock v. *Memphis*, 87 U. S., 636.

In that case, Mr. Justice Miller, carefully analyzing the duty of the Supreme Court in such cases, holds, among other things:

> "But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered or remand the case to that court, as the circumstances of the case may require." (See page 636 of the opinion.)

Now, this rule, when applied to the case at bar, we submit necessitates a reversal. The fact that Messina was violating the Federal Act was urged here as a complete bar to the right of recovery. The court decided the federal question erroneously. The opinion fails to disclose any other basis for affirming the judgment. How can this court say that the Mississippi court would have affirmed in any event, even though it had correctly decided the federal question? To say the least of it, the matter is involved in doubt, and it is not the province of the court to anticipate what the Mississippi court will hold. At the very least, the case should be reversed, and the Mississippi court be permitted to say whether Messina is entitled to recover, although he was in fact violating a federal statute.

DEMAND FOR TEN PER CENT. DAMAGES.

Defendant in error in this case concludes his brief with a demand that damages should be assessed on the ground that the appeal is frivolous. We hardly think it necessary to discuss this question at any length. No appeal can be considered frivolous unless the questions have been precluded by previous decisions of this court. No decision of this court has been pointed out or can be found which directly or by fair intendment rules against us the provisions for which we are contending. The true ruling on the subject of imposing damages is set out in a series of decisions of this court. It must appear that the appeal was simply for delay before such damages will be awarded. See

Kenosha v. *Campbell*, 131 U. S. (page 97 of the appendix).

McKee v. *Rains*, 10 Wall., 22.

There is nothing in this record to indicate that this appeal was not prosecuted in good faith, and certainly the federal questions raised are serious and have not been precluded by any decision of this court. We, therefore, respectfully submit that no damages should be awarded, even though the case should be affirmed.

CONCLUSION.

The limits upon our time will not permit any argument in reply to the second federal question which we submit to the court. That question grows out of the application of the so-called *prima facie* statute, Section 1985, of the Mississippi Code of 1906. Without in any way abandoning any of our contentions contained in the original brief, we are content to submit this point upon the arguments there presented.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 535

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Plaintiffs in Error,

vs.

V. P. MESSINA,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a personal injury case. The Defendant in Error, V. P. Messina, a young man, received permanent injuries while riding on the tender of one of the locomotives of one of the Plaintiffs in Error, Illinois Central Railroad Company.

The facts as found by the jury in the trial court, and sustained by the Mississippi Supreme Court are as

follows: Defendant in Error was a switchman of the Plaintff in Error, but was not then on duty. He was given permission by the engineer of the Illinois Central Railroad Company, one of the Plaintiffs in Error, to ride on the tender of the locomotive of its fast passenger train, then engaged in interstate commerce, from Canton, Mississippi, to Memphis, Tennessee. While so riding, he was injured by a derailment of the locomotive and a part of the train, due to the track being washed away, and then under water waist deep. The engineer giving permission had received warning from the train dispatcher that the track over which his train must shortly run was under water between two stations, (Beaty and Sawyer.) The engineer, with the warning in mind, ran his train over the identical track covered by the warning, at a rate of fifty miles to sixty miles an hour, in the night time, during a misting rain, with a headlight which lit up the track only twenty-five yards ahead. He was able to stop his train, at the rate of speed admitted by him, within a distance of one hundred and fifty yards. While so running, the train went into the water, over the track and after running one hundred yards, the engine turned over, causing the injury to Defendant in Error. In short, the engineer, by his own admission, was running his engine under circumstances which caused the Mississippi Supreme Court, in its opinion, to characterize it as "so flagrant that the court would have been warranted in instructing the jury peremptorily that his conduct was wanton and in reckless disregard of the consequences." (Tr. 143.)

The Mississippi Supreme Court said:

> "The crew in charge of this train **knew** of the threatened danger, and when the train entered the danger zone, it seems to us that the engineer should have reduced his speed to the point where he could have brought it to a standstill in less than one hundred and fifty yards. The evidence shows he was rounding a curve in the road, and on account of the existing weather conditions he could not see further than twenty-five yards in front of his locomotive. This, we believe, was

taking chances with the human lives in his charge, that was little, if any, short of reckless indifference to the consequences." (Tr. 144.)

The Defendant in Error received his injury at three-twenty in the morning, and was taken in charge by Plaintiff in Error, Illinois Central Railroad Company, and uselessly, and inhumanly, permitted to lie in his wounded condition (limbs broken and flesh torn from his body), until nearly noon of the day of his injury, without medical aid. This too, when Plaintiff in Error had its hospital and physicians three miles away, to which all other injured persons were promptly carried. The refusal to carry Defendant in Error to relief, and the wilful neglect of him, was accompanied by the grossest and most shocking insults and abuse, by the agent of Plaintiff in Error in the car where the Defendant in Error was taken. (Tr. 61). Because of this treatment (useless and, from the language used, vindictive), he was made to suffer greater permanent injury than would have resulted otherwise.

These two theories of Defendant in Error, to-wit: His injury by the wilful, wanton, and grossly negligent conduct of the engineer of Plaintiff in Error, in the operation of the train; and his needless and inhuman exposure after his injury, were submitted to the jury by the pleadings, proof and instructions, which the Mississippi Supreme Court held to be without error. Upon these two issues, a recovery of Ten Thousand Dollars resulted in the Circuit Court of Holmes County, Mississippi, and this judgment was affirmed by the Supreme Court of that State. The writ of error to this court is from that judgment.

Neither during the trial of the case in the trial court, by the evidence, pleading or instructions, nor in the motion for new trial, was there any Federal question raised, or even intimated. Not even in the assignment of errors in the State Supreme Court was such question raised. Not even in the original submission of the case in that court was it raised. It remained for Plaintiff in Error by a supplemental brief to

raise, for the first time, one of the Federal questions relied upon here, to-wit: The alleged violation of the Hepburn Act by the Defendant in Error. The Supreme Court of Mississippi, however, in response to the argument by Plaintiffs in Error, did construe that Act, as shown by its opinion (Tr. P. 146). So that Federal question is properly brought up on the Writ of Error.

It is now contended in this Court by Plaintiffs in Error that two Federal questions are presented:

First: That the Mississippi Supreme Court erroneously construed the Act of Congress to Regulate Commerce, as amended June 26, 1906, (Hepburn Act) which prohibits free interstate transportation of passengers.

Second: That the Supreme Court of Mississippi, in giving effect in this case to Section 1985 of the Mississippi Code of 1906, denied to Plaintiffs in Error the equal protection of the law, and deprived them of their property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

A motion was duly made by Defendant in Error to dismiss, upon the ground that the alleged Federal questions are wholly formal, and are frivolous, and have been expressly foreclosed. A motion to affirm, on the ground that the Federal questions were so frivolous as to need no further argument, was also made, in event the court overruled the motion to dismiss. This court thereafter, acting under Paragraph 6 of Rule 6, ordered the case transfered for hearing to a summary docket.

BRIEF.

The Question of the Alleged Violation of the Hepburn Act.

We will discuss this feature of the case from two viewpoints. **First.** The record clearly shows that Defendant in Error has not violated this act, and therefore the ruling of the Mississippi Supreme Court is correct. **Second.** Even if the construction of the act by the Mississippi Supreme Court is erroneous, and Defendant in Error was violating it when injured, yet it constituted no defense whatever.

First.

A consideration of the evils that Congress attempted to remedy by its several acts dealing with the matter of discrimination by common carriers, both in transportation of interstate freight and passengers, makes the correctness of the ruling by the Mississippi Supreme Court, that the Act called in question did not apply to Defendant in Error, so clear that it is difficult to argue the question. A mere statement of the case, or rather the facts of it, preclude the applicability of the Act as a factor in the solution of the question here. Congress was dealing with an evil which had attained such proportions as to become a burden to the carriers, and a gross injustice to the public. The aim and purpose of Congress was to stop the giving of free passes, or transportation, to certain **passengers** as a special privilege, not enjoyed by every other passenger. In order to prevent evasion, the Interstate Commerce Commission was given power to promulgate rules, etc. These rules, carrying out the mentioned purpose of Congress, hedged about in every reasonable way the granting of passes, or the riding by employes, then on duty, without passes. It was desired that every person riding as a passenger of the carrier (not as a trespasser, against its express will and direction) should pay in money his passage, rather than in exchange for advertising,

past service, future favors or business, or supposed influence, political or otherwise. It had never been contended that there had been such an injurious effect to the carriers, and to the shipping and traveling public by the occasional riding of a "trespasser" in a box car, or upon the tender of an engine, as to call Congress to take action thereon. If such condition should arise, as the able counsel for Plaintiffs in Error foresee, by the Mississippi Court's construction of the law, Congress may be relief upon to make it an offense for a "tramp" or other unfortunate to make his way on the trucks of a car, or on the "blind" of a baggage car, or the tender of an engine. This Court in its several decisions has never intimated that the Hepburn Act was ever intended to apply to a case like the instant one.

The language of the act, aside from the evil it was aimed at, so clearly excludes the contention of opposing counsel as to make necessary only a reading of its terms. Omitting certain phrases of the Act not involved here, it provides:

> "No common carrier * * * shall * * * directly or indirectly **issue** or give any interstate free ticket, free pass, or free transportation for **passengers** * * * ."

In other words, the carrier is forbidden to **issue** or **give** any free **ticket** or **pass**, except to certain employes, etc. In the next place it is forbidden to issue or give any free transportation to **passengers**. It is of course conceded that Defendant in Error had no pass or ticket issued to him, as an employe, or as a privileged passenger, in violation of the Act. That he was not a passenger, but a mere **trespasser** was decided by the lower court, and, as shown by the transcript, he was treated by both sides in the trial court, and in the Supreme Court, as a trespasser, and nothing more. Even as a trespasser, under the local law of Mississippi, and of humanity as well, there was a duty not to wilfully or wantonly injure him.

It was no case of this sort that Congress aimed at. The Act was directed against the carrier, and the person who violated its provisions. The carrier could only be subjected to fine when,

through some agent, or officer, it acted. It could only act through such servant, as had power or authority to issue passes or tickets, or could give "free transportation to passangers." It is needless to argue that an engineer of a locomotive cannot give passes or tickets, or give "free transportation to passengers." He had no control over this department of the service of carriers. He only runs the locomotive under direction and orders of dispatchers, and under the personal supervision of a conductor. Indeed the transcript in this case shows affirmatively that it is a violation of Rule 728 of the Rules of the Transportation Department (Tr. 94-95) of Plaintiff in Error for the engineer to even permit persons to ride upon the engine, where Defendant in Error was riding at the time of his injury, due to the wilful and wanton conduct of the engineer. It is therefore too plain for argument that Plaintiff in Error, as a common carrier, could not be held for a violation of the Act, and subjected to a fine of $2,000.00.

This leads to the consideration of the question, if a criminal prosecution was instituted. Under the provision of Section One of the Act, any common carrier violating the Act, and any person "who uses any such interstate free ticket, free pass or free transportation, shall be subject" to a penalty. This necessarily means, that, in a case, such as Plaintiff in Error tries to make this one, of the giving of a pass or free transportation, and the use of it by such person, both the carrier, and the receiver, would be guilty and subject to the penalty. Leaving out the question of mental capacity, etc., one could not be guilty unless the other was also guilty. It is not conceivable that the Court would hold under the facts of this case that Plaintiff in Error, as a common carrier, would be guilty of a violation of this Act, because of the unauthorized act of its locomotive engineer in permitting a man to ride on the tender of his engine. Yet that is the necessary and logical conclusion of the argument of opposing counsel. If counsel's position is right, it would lead to the holding that, every time a tramp hid in a box car and rode across a state line, with the knowledge of a switchman, who did not eject him, the carrier

and the tramp would be liable to the penalty of the Act. This is entirely apart from any intended or expressed purpose of Congress. No authorities can be cited, as there is no reported decision of any appellate court, except the one brought here for review, on the question involved.

Of course, if the holding of the Mississippi Supreme Court, that Defendant in Error was not violating the Act when he received his injury, is affirmed by this Court, the Federal question is ended, so far as its assignment can aid Plaintiffs in Error. It would in that event make no difference whether a violation would constitute a defense to this action.

Second.

Even though the ruling by the Mississippi Supreme Court as to the applicability of the Hepburn Act to the facts of this case should be conceded to be erroneous, still this Federal question is without merit, and the case should be affirmed. We assert this upon the authority of Southern Pacific R. R. vs Schuyler, 227 U. S. 601. But opposing counsel, with great ingenuity, attempt to distinguish the Schuyler case, and to show that it is not an authority here. Quite an ingenious argument is made in this effort, but, as we will show later herein, it is entirely fallacious, and based upon a false premise.

It was decided by the Mississippi Supreme Court that, under the facts disclosed, neither the Hepburn Act nor the regulation of the Interstate Commerce Commission had any application, since it was clear that the engineer had no authority to give a free pass or to bind the company in that regard. Of course, if a violation of the Hepburn Act would be no defense, then the fact that the Mississippi Court had held (even erroneously) that there had been no violation of it, would not call for a reversal here. In fact, while there would be a Federal question here, it would be purely formal, and, as was said in the Schuyler case, make unnecessary any decision by this court as to whether the Act had in fact been violated.

We respectfully submit that the Schuyler case is conclusive here. In that case a mail clerk, then off duty, while rid-

ing in a baggage car was killed, by the negligence of the Railroad Company, which negligence, under the local decisions of Utah, made a case of liability. The Utah court (27 Utah, page ——) after a thorough consideration of the case and a re-argument, decided that the deceased was not violating the Hepburn Act in taking free passage in the car while he was off duty. The court further held, however, that, even if he had been violating the Hepburn Act, it would have constituted no defense, and cited authorities of the Utah court and other courts to sustain this view. In fact, there is practically no dissent from the view taken by the Utah court that the mere fact that a person at the time he receives an injury is violating some statute, whether state or Federal, does not of itself deprive him of the right of recovery. We will cite authorities to this effect later in this brief.

When the Schuyler case reached this Court, it was decided unequivocally that it was unnecessary for this court to determine whether or not deceased was violating the Hepburn Act when he met his death, for the reason that it would have constituted no defense, the Hepburn act providing its own penalty for a violation. This holding of the court was in the following language:

> "As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn Act is such as to deprive one who, in good faith, and without fraud, and with the consent of the carrier, but in actual though unintentional violation of the prohibitions of the Act, accepted a free pass in interstate transportation, of the benefit of the rule of local law that renders the carrier in such circumstances responsible for exercising care of the passenger's safety, because the carrier has voluntarily undertaken the burden of such care. But the Act itself declares what penalties shall be imposed for the violation of its provisions: Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty not less than $100.00 or more than $2,000.00, and any person, other than the persons excepted in this provision, who uses any such

interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates this provision by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb or safety, and no more forfeited his right to the protection accorded by the local law to passengers in his situation, than the carrier forfeited his right or property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being, of whose safety the Plaintiff in Error had undertaken charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage under such circumstances of the benefit and protection of the law of the state in this regard.

"It results that the judgment under review must be affirmed irrespective of the question of whether the Hepburn Act forbids the giving of free interstate transportation to the employes of the railway mail service when not on duty."

The Utah Court held, as stated, that there had been no violation of the Hepburn Act, and further, that it constituted no defense. The Mississippi Court held that there had been no violation of the Hepburn Act, and, as we will presently show, under its decisions correctly understood, which decisions are in accord with the decisions of this Honorable Court, and of practically all the courts of the land, it would constitute no defense in this case. But opposing counsel have cited the case of Western Union Telegraph Company vs. McLaurin, 66 Southern Reporter, page 739, in an effort to show that the supposed violation by the Defendant in Error of this Act would have constituted a defense, and that the Mississippi Court would have reversed this case but for its erroneous con-

clusion that there had been no violation of the Act. This court, we respectfully submit, cannot assume that the Mississippi court would have so held, when such a holding would have been directly in violation of the holding of this Honorable Court in the Schuyler case and other cases, as well as against the overwhelming weight of authority.

The right of action of the Defendant in Error asserted in the court below was not derived from any contract, and was not deduced from any supposed violation of the Hepburn Act. It arose from the obligation created by law, as construed by the state court, not to wilfully and wantonly injure him after consenting, and therefore having knowledge that he was aboard the engine. In truth this principle of law is not seriously controverted or qeustioned by the decision of any court. We will cite only a few cases:

Delaware L. & W. R. Co. vs Troutwein (N. J.) 7 L. R. A. 435;

Carroll vs. Staten Island R. Co. (N. Y.) 17 Am. Rep. 221;

Opsahl vs. Judd (Minn.) 14 N. W. 575.

The violation of the Hepburn Act, assuming for the sake of argument that the Defendent in Error here was guilty of such violation, was in no sense the cause of his injury, nor did he have to rely upon such illegal act in order to make out his case. It was only the occasion for his injury by the Railroad Company's wilful, wanton and grossly negligent act, as held by the Mississippi Supreme Court. It was merely a condition, and was not a contributing cause.

Delaware L. & W. R. Co. vs. Troutwein, (N. J.) 7 R. A. 435, Supra;

Jacobus vs. St. Paul R. Co. (Minn.) 18 Am. Rep. 360.

In short, this Court, in the Schuyler case, supra, decided long before this writ of error was granted, was only applying the Hepburn Act and its supposed violation to known, es-

tablished and uncontroverted legal principles. The decision of that case is absolutely conclusive of the question raised here on that assignment or error.

In Watson on Damages for Personal Injuries, Section 230, it is said:

> "At the outset it may be stated, as a general rule, that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act, is not sufficient to relieve the author of the wrong, of liability in damages therefor. The question how far a person can defend an otherwise indefensible act, it has been said, by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result generally reached, is that no man can set up a public or private wrong committed by another, as an excuse for a wilful or unnecessary, or even negligent injury to him or his property. This principle is defended on the ground of morality and law, and it reaches and determines a great variety of cases."

In the case of Sutton vs. Wauwatosa (Wis.) 9 Am. Rep. 534, Chief Justice Dixon, of the Supreme Court of Wisconsin, said:

> "Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plantiff as an offender against the laws of the state, and thus to impose upon him a penalty many times greates than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail."

The courts are unanimous in holding that a carrier in transporting a person in violation of constitutional or statutory provisions cannot rely upon the violation of such provisions to evade the consequences resulting from personal injury through the negligence of the carrier. This is but another way of say-

ing that the one guilty of negligence (and certainly of wilful or wanton negligence, Phila. & R. Co. vs. Derby, 14 Howard 502) cannot justify his own wrong doing by saying that the injured person was himself guilty of a wrong. The following cases sustain this position, and in fact there is no dissent:

John vs. Northern Pac. R. C. (Mont.) 32 L. R. A. (N. S.) 85;

Gabbert vs. Hackett (Wis.) 14 L. R. A. (N. S.) 1070;

Bradburn vs. Whatcom Co. R. C. (Wash.) 14 L. R. A. (N. S.)26;

Delaware L. & W. R. Co. vs. Trautwein (N. J.) 7 L. R. A. 435, Supra;

Carroll vs. Staten Island R. Co. (N. Y.) 17 Am. Rep. 221 supra.

In fact, the proposition is so thoroughly established by the decisions that a further citation of them is useless. No decision can be found to hold that, the Defendant in Error, even if violating the Hepburn Act, would be thereby, under the facts of this case, deprived of his right to recover because of the wilful and wanton conduct of the agent of the Plaintiff in Error in causing the injury. The decisions cited by opposing counsel are not in point. Most of them simply announce the formal doctrine invoked in actions upon contracts which are illegal, or based upon an immoral consideration, or against public policy. The courts unanimously hold that such contracts, when a cause of action is based thereon, are not enforceable. There is one exception to this rule, recognized by the Mississippi court and by this Honorable Court, which will presently be called to Your Honors' attention.

Counsel contends that the Mississippi Court, as shown by the McLaurin case, supra, is committed to a doctrine which would have availed as a defense there, but for that court's erroneous construction of the Hepburn Act. Therefore, they contend that there should be a reversal of this judgment, al-

though this court has expressly held that a violation of this very Act is no defense, in a case almost identical with the one at bar. A careful consideration of the McLaurin case will show plainy that the principle announced there is entirely different from the one involved in the Schuyler case; and in this case. To say that one cannot recover, regardless of the conduct of the wrong-doer, simply because he, at the time, was engaged in a violation of some law, which violation is separate from and independent of the act of the wrong-doer which caused the injury, is quite different from the announcement of law contained in the McLaurin case.

In the McLaurin case, the plaintiff had lived in adultery with a woman, who sent him telegrams which were divulged by the telegraph company, in plain violation of its duty as a public servant. He promptly sued for the humiliation following the exposure of his relations, to his business and social associates. His cause of action therefore was based upon this contention:

> "My illicit relations existed, but I have kept them secret from my associates, and my social and business standing has been unaffected. You, as a public carrier of messages, wrongfully exposed my misconduct, therefore you must compensate me, and let me profit by my immoral acts."

Upon this contention the Mississippi Supreme Court said there could be no recovery, because:

> "The principle of public policy is that no court will lend its aid to a party who **grounds** his action upon an immoral or illegal act. It is clear from the record that plaintiff's injuries, his humiliation, and shame, sprang from his illicit relations with the woman in the case. But for his immoral commerce with the lady of easy virtue, there would have been no shame, no humiliation, and the disclosure of the contents of the telegrams would have caused no pain—no injury, to his reputation. His claim for actual damages is **grounded** upon, and has **no foundation** save for the fact that he has been violating the Seventh Commandment."

Again the court in its opinion said:

> "Leaving out of view the immorality of plaintiff, the wrongs of the company did not injure plaintiff; without the aid of his immoral relations with the scarlet woman, he cannot show any injury to his self-respect. It thus appears that the courts will not entertain this action at all, although it may appear that the telegraph company has been guilty of a wanton disregard of its public duties."

In the case at bar, the engineer, having knowledge that Defendant in Error was upon his engine, owed him, under the Mississippi law, the duty not to wilfully, or wantonly injure him. This was the theory upon which the case was tried in the trial court, and in the Mississippi Supreme Court, and was the only ground of liability claimed. It was never sought to place any higher duty on Plaintiff in Error than that owing to a trespasser, under the Mississippi law. Having permitted Defendant in Error to ride upon the engine, even in violation of his principals instructions, there immediately arose, under the Mississippi law, as well as that of humanity, the duty to him as a human being, independent of any contract, to refrain from a wilful or wanton injury. He in no way required the aid of his supposed violation of the Hepburn Act to establish his case. He did not **ground** his action upon his alleged illegal act. His injury did not result from any wrong he had done, but from the separate and independent wrong done by the agent of Plaintiffs in Error. He could as well recover, whether he in fact did violate the act, as he could if he had not violated it. His violation was only because his contemplated journey took him across the line into Tennessee. Had his trip been only from Jackson, Mississippi, to Winona, Mississippi, (near where the injury occurred) he would not have been in even a supposed violation of the Act, and his right to recover would, according to the Mississippi law, have been certain. Yet it is contended that the same engineer, with the same train, at the same place, and under the same circumstances, who wilfully and wantonly injured this man, would not be

liable, simply because he was violating the Hepburn Act in going to Memphis, while he could have recovered if he had only been going to Winona. Again, if there had been on this same train, with the consent of the same engineer, given at the same time, a person going from one point in Mississippi to another point in that state, and he had been injured at the same instant that Defendant in Error was injured, and from identical causes, would it be contended that one could recover and the other could not recover. This instance demonstrates that neither would be grounding his case on any illegal act. To give standing in court, there was no need to invoke the supposed illegal act, as it was not a contributing cause of the injury. The injury could as well occur, without the violation of the Hepburn Act, as with such violation.

It is therefore clear that the Mississippi Court is not committed to such a rule as opposing counsel argue the McLaurin case to announce. In fact, the Mississippi Court is in perfect accord with the Utah Court, and the practically unanimous holding of the courts on this question. That this is the holding of the Mississippi Court is shown by the case of Conithan vs. Insurance Company, 91 Miss. 386. In that case recovery was successfully sought on an insurance policy covering property kept in a bawdy house and used for the purposes of prostitution. In affirming the judgment rendered for plaintiff in the trial court, the Mississippi Supreme Court said:

> "The insurance contract was not necessary in order to enable appellant to conduct her bawdy house. The contract of insurance did not in any way advance her interest in this business or encourage it. It did not promote the unlawful business, or help her to accomplish it in any way whatever. She could have conducted and carried on her bawdy house as well without the insurance policy as she could with it. The only effect of the insurance policy was that, in case her property was lost by fire, she should have an indemnity for the loss of the property; but the contract did not even remotely aid or assits her in the conduct of this business. She

did not receive, by means of this insurance, any aid to the conduct of her business. The only thing she did do was to make an illegal use of the property which the provisions of the policy covered; but this did not invalidate the contract. The keeping of the bawdy house was an independent illegal transaction, which the insurance policy in no way aided or promoted. To defeat the action on the policy it is necessary to hold that the policy itself is an immoral contract, against public policy, tending to promote the business of maintaining a bawdy house. The record in this case does not show that the contract of insurance was an immoral one, and against public policy, nor is its tendency necessarily or even remotely the promotion of the business of maintaining a house of prostitution. The insurance of this property, although it may be illegally used, is a perfectly good insurance, unless the contract of insurance in some way promotes the business."

The rule that where parties are in pari delicto the court will lend its aid to neither, is subpect to the exception that the rule will not be applied where paramount public interest requires the intervention of the court. This is the holding of the Mississippi courts as shown by Rideout vs. Mars, 99 Miss., 199, and also of this court as announced in T. & P. R. R. Co. vs. Mugg, 202 U. S. 242. That rule clearly excludes the contention of counsel for Plantinff in Error made here, that the mere fact of a violation by Defendant in Error of the Hepburn Act would, of itself, preclude a recovery against the independent and separate wilful and wanton act of the engineer. Paramount public interest requires that the courts do not close their doors against redress for a wilful and wanton wrong, done one who may himself be guilty of a separate wrong, upon which he does not rely for redress, nor which was in any way proximate to his injury.

THE QUESTION ARISING FROM THE APPLICATION OF SECTION 1985 OF THE MISSISSIPPI CODE.

This section will be found correctly set out on page 31 of the brief of opposing counsel. In view of the admission of counsel that this identical statute, directly assailed in this court in the case of Mobile, Jackson & K. C. R. R. vs. Turnipseed, 219 U. S. 35, has been sustained as constitutional, it is strange that so much argument should be again indulged here. We call attention to the fact that this same statute was again sustained by this court, when assailed by the same counsel who here again call it in question, and the cause in which it was raised dismissed for want of jurisdiction, because the question was too frivolous to sustain jurisdiction.

Easterling Lumber Co. vs. Pierce, 235 U. S. 380.

The whole ground of complaint is summed up in counsel's brief on pages 32 and 33, where they say, (page 32) that this statute

> "was so applied under the peculiar facts of this case that it became not a rule of evidence but was used to create a presumption of liability; indeed was so applied as to deny to the plaintiff in error one of its substantial defenses." On page 33, it is said: "If, however, it can be shown to the court that, in the instant case, this statute was so applied as to deny to the railroad company the right to make substantial defenses, it is clear that the court would reverse the case and hold that the statute has been improperly applied."

It is conceded by counsel that the Mississippi Supreme Court has followed the interpretation of this statute by the Turnipseed case in its decisions, namely in Railroad Company ve. Thornhill, 63 So. Rep. 674, and in Alabama G. S. R. R. Co. vs. Daniell, 66 So. Rep. 730, and they confess

> "no quarrel with the interpretation put upon this statute by the Supreme Court in other cases."

But they say that in this case, the statute had no place, and should not have been invoked, because the Mississippi Court said:

> "There is no material conflict in the evidence except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer." (Tr. 143.)

Such an argument has no place here for three reasons. In the first place, the Mississippi Supreme Court has expressly held that where all the facts are in evidence, the case is to be decided on the facts as proven, and not on the presumption, but that the instruction may be given, without injury, or error, being predicated thereof.

Railroad vs. Thornhill, 63 So. Rep. 674;

Alabama G. S. R. R. vs. Daniell, 66, So. Rep. 730;

Railroad Co. vs. Murray 91 Miss., 547.

In the second place, the question of the giving or refusing of the instruction where all the facts are in evidence, so long as neither party is denied due process of law, or equal protection under the law, is purely a matter of local practice and procedure, and the finding of the state court thereon is conclusive.

Parker vs. McLain, 237 U. S. 469;

Central Vermont R. R. Co. vs. White, 238 U. S. 607.

In the third place, the Mississippi Supreme Court has decided, having substantial support in the record, that there is no material conflict in the evidence, and that the showing by the engineer made the case, upon the part of the Plaintiffs in Error, one of wilful and wanton conduct, resutling in the injury to Defendant in Error. The showing by Defendant in Error of course made such a case even stronger. This court will not go behind that finding of fact, but will follow it where, as here,

there is no intimation that the Mississippi Court did not act in good faith.

Missouri K. & T. R. R. Co. vs. West, 232 U. S. 682;

St. Louis & I. M. R R. Co. vs. Croft, 237 U. S. 648;

and cases there cited.

King vs. West Virginia, 216 U. S. 100;

Waters-Pierce Co. vs. Texas, 212 U. S. 97.

But counsel in their brief further argue that, as the Mississippi Court in the Daniell case held it was error to invoke this statute, in view of the fact that all the facts and circumstances had been proved, this court should do so in this case. The very plain answer to this is that, as that was a matter of local practice and procedure, the decision of the Mississippi court is final. The argument would only have been appropriate in the lower court, where it was not even made. In the next place, the Daniell case did not decide what counsel contends. The only thing decided by the Daniell case was that, in that particular case, the giving of an instruction based on this statute wherein too great a burden was placed on the railroad, was error. This was for the reason that, in the Daniell case, the deceased was found dead, manifestly killed by the railroad company's train, in the night, and without explanation and clear showing of the facts and circumstances by the Railroad, and such facts as proven not exonerating the company from blame. As the accident occurred in the night, unknown to the train crew, who could only show care in handling of the train, safe road bed, and proper equipment, the Court decided that, in view of the fact that the entire case of plaintiff, in the trial court, depended and rested upon the prima facie case, the instruction was error. Without the statute in the Daniell case there was no case, as no proof as to how decedent met his death could be made by the railroad company. Therefore, the court held the language of the instruction was erroneous.

It is attempted to be shown that the Mississippi Supreme Court, having reversed the Daniell case, denied Plaintiff in

Error the equal protection of the law, in not reversing this case. The answer here is two-fold. In the first place, even if the contention were true, under the facts of this case, it would not constitute a denial of equal protection, so as to raise a Federal question.

In the second place, the facts of the cases are so different. The Supreme Court of Mississippi in this case has expressly decided as a fact, that, on the showing made by Plaintiff in Error, in the trial court, there was no serious conflict on the question of how the train was being run (the only question to be affected by the prima facie statute); that, on Plaintiff in Error's own showing, it was liable on this branch of the case, so that no other verdict could have been rendered.

The method of handling this train, under former repeated decisions of the Mississippi Supreme Court, was wilful, wanton, and reckless negligence. The court was only re-affirming and applying its local law on that subject.

St. Louis & S. F. R. R. Co. vs. Moore 101 Miss., 768;

Nixon vs. Illinois Central R. R. Co. 103 Miss., 405.

That it would not reverse where error occurred, if in the opinion of the court the right result was reached, and no harm could have been done by giving the erroneous instruction, where there was no serious conflict in the evidence, or where the showing made by defendant clearly indicated liability, the Mississippi Court has repeatedly announced.

Bell vs. Medford, 57 Miss. 31;

Nichols vs. G. & S. I. R. R. 83 Miss. 126;

Searles vs. Western Assurance Co., 88 Miss. 260;

Melton Hardware Co. vs. Heidelberg, 91 Miss. 598;

Arky vs. Cameron, 92 Miss. 632;

St. L. & S. F. R. R. Co. vs. Moore, 101 Miss. 768.

In fact, one of its rules in force provides: "Rule 11. No

judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice." Sec. 104 Miss. Rep. 906. Such a rule is permitted by Section 4914 of the Mississippi Code of 1906, which is authorized by Sec. 146 of the Constitution of Mississippi.

The rule is well known by one of the counsel for Plaintiff in Error, who for many years was a distinguished member of the Mississippi Supreme Court.

The opinion here (Tr. 147) clearly shows that the Mississippi court was applying this rule, and its decisions mentioned above, in absolute good faith, in deciding this case. The court said:

> "The court did not, by this sentence, intend to say that it was improper to instruct the jury that proof of injury by the running of the train was prima facie evidence of negligence. This court has repeatedly held that rule could be given in charge to the jury even when all the facts and circumstances were in evidence. The court merely held that the rule that 'the circumstances of the accident must be clearly shown and the facts so proven must exonerate the company from blame,' was the rule for the guidance of the court in determining whether or not it could be said, as a matter of law, that the burden of the statute had been met and overthrown.
>
> "Whether or not the giving of the instruction in the form criticised in Daniell's case will be held as prejudicial error will necessarily depend upon the facts of each case."

Being a court of last resort, its judgment is final and conclusive on this question, which is one of fact.

Missouri K. & T. R. R. Co. vs. West, 232 U. S. 682;

St. Louis & I. M. R. R. Co. vs. Croft, 237 U. S. 648,

and cases cited.

Finally, it is contended that the statute is invoked in such

a way as to prevent the railroad from submitting to the jury the most important question of fact involved (in fact the only one according to the Mississippi Supreme Court's finding), to-wit: "the knowledge of the engineer as to the presence of Messina on the train." Brief of Plaintiff in Error, Page 36. The part of the instruction criticised and on which the argumtnt is based, is:

> "If all the evidence leaves it doubtful, or a matter of conjecture as to how the train was being run by the defendant's servants in charge of it, then the defendant has not met the burden, and it is your duty to find for plaintiff, etc." (Tr. P.—)

The argument has no place here. It was for the Mississippi Supreme Court, and was doubtless made there, as the opinion of that Court says:

> "There is no material conflict in the evidence, except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer. This question was a question of fact and its solution was submitted to the jury." (Tr. 143.)

It was submitted to the jury directly and square as one of the two issues in the case by plaintiff's instruction No. 2 (Tr. 17.) The jury was not misdirected. The pleadings showed the two issues, permission by the engineer to ride, and the manner of handling the train. The evidence went to prove on the one hand, these two issues, and to rebut them on the other hand. Then the instructions, as shown by Numbers 2 and 4, for the plaintiff, directed the jury on these issues. The objection here is entirely technical, and presents no question for review by this court. It was for the Mississippi Supreme Court to decide whether, its local law of practice and procedure, in the matter of instructions, had been observed. That court expressly held that it had been done. This court therefore will not review that finding. However, counsel has practically apologized for making the argument here, for they say, on page 37 of their brief:

> "It may be said, however, that this is an argument which we should have addressed to the state court, and that this court is not concerned with the question."

Aside from this, even if this court had the question on direct review from one of the Circuit Courts of Appeal, it would not reverse, as it is not made to appear that prejudice resulted in the trial of the case. On the contrary, the only court that could pass upon the question on direct appeal has expressly decided that there was no prejudice.

> Texas vs. P. R. R. Co. vs. Bigger, U. S. Advance Sheets, Jan. 15, 1916, page 127.

CONCLUSION.

We respectfully submit that the Federal questions raised here are wholly without merit, if not entirely frivolous, and that the motion to affirm heretofore made, and which it yet undecided, should be sustained. As we understand the attitude of this case, this court has never passed upon these motions, but has placed this case for hearing upon a summary docket, and the motions are merged into the hearing of the case on that docket.

We therefore respectfully invoke the present Subdivision 5 of Rule 6:

> "The Court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the question on which the decision of the cause depend are so frivolous as not to need further argument. The same prodecure shall apply to and control such motion as is provided for in cases of motions to dismiss under Paragraph 4 of this rule."

We also respectfuly invoke the doctrine announced in Deming vs. Carlisle Packing Co. 226, U. S. 102, through Chief Justice White, that, as the

> "conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been

> prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this court also leave it no longer open to discussion that where it is found that a Federal question upon which a writ of error is based is unsubstantial and frivolous, the duty to affirm results."

In view of what has been said, and the fact that the Federal questions here relied upon were not considered of enough importance to raise them in the court of original jurisdiction, or in the Supreme Court of the State, and that each of them had, by the decisions of this court, been expressly decided to be without merit, we are forced to conclude that the attitude of Plaintiffs in Error is, as stated by Mr. Justice Brown, in Chicago, etc., R. R. vs. McGuire, 49 Law Ed. 413:

> "This case is the not infrequent one of an attempt to clutch at the jurisdiction of the court as an afterthought, when all other resources of litigation have been exhausted."

We therefore respectfully submit that the case should be affirmed.

Respectfully submitted,

WM. H. WATKINS.
Attorney for Defendant in Error.

BARBOUR & HENRY,

BURCH & STRICKER,
Of Counsel.

OCT 23 1915
JAMES D. MAHER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 535

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Plaintiffs in Error,

vs.

V. P. MESSINA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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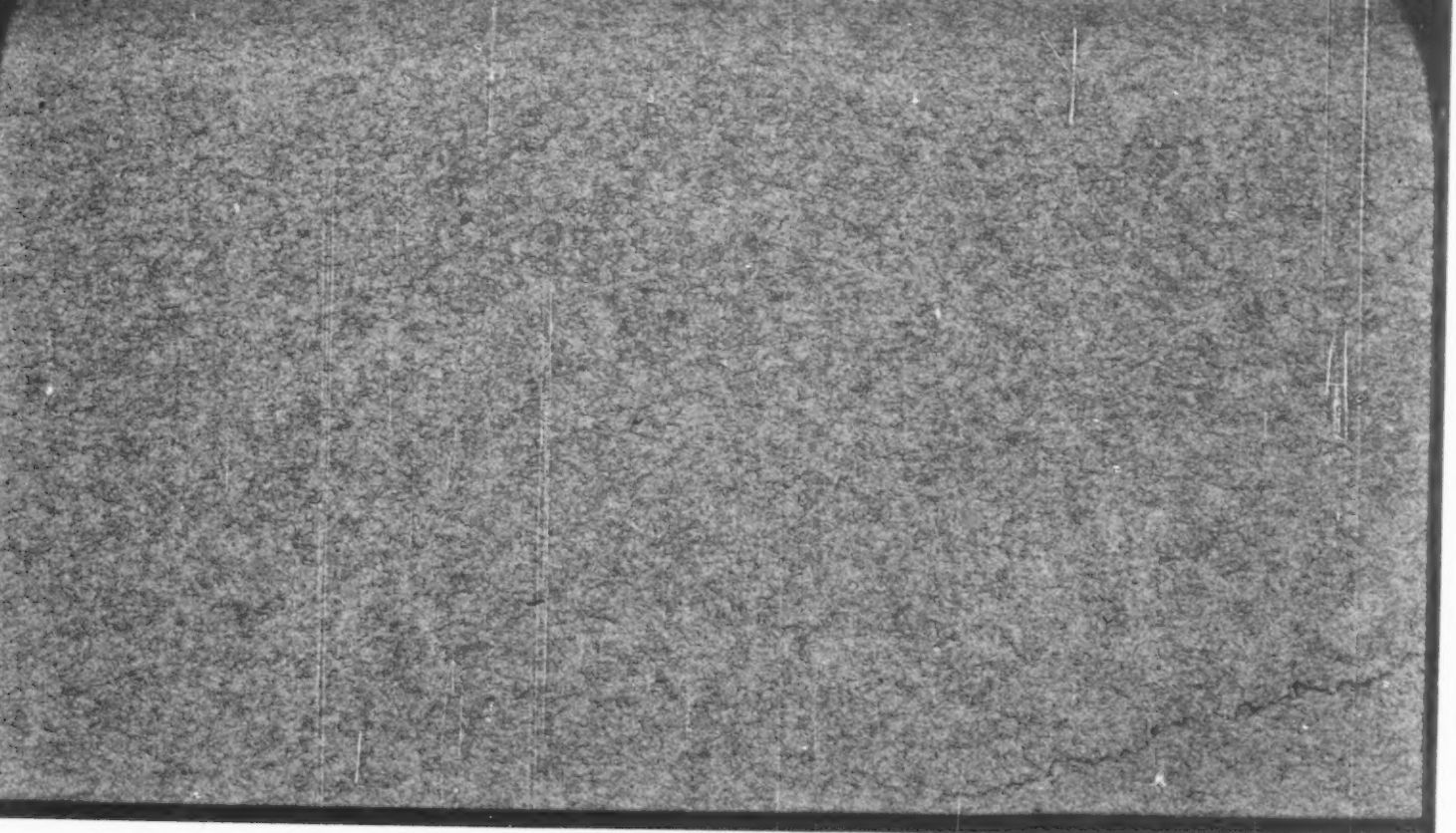

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

GROUNDS OF MOTION.

Acting upon the assumed authority of Rule 6 of the Rules of the United States Supreme Court, and particularly Sections 4 and 5 thereof, the defendant in error has filed a motion in this court to dismiss or affirm this case. The motion to dismiss is rested upon the proposition that the Supreme Court is without jurisdiction for the reason that the federal questions presented in the assignment of errors are devoid of merit, are frivolous and have been foreclosed by previous decisions of this court. The motion to affirm rests upon substantially the same propositions, it being contended that the federal questions are too frivolous to support a writ of error. Since both motions rest upon precisely the same grounds and,

taken together, present but a single question, it is no thought that any good purpose will be accomplished by considering these two motions separately.

The gist of the contention of the moving parties is that the federal questions upon which the plaintiff in error relies to give jurisdiction to this court have been heretofore clearly and plainly settled by decisions of this court, so that this appeal must be held to have been taken merely for delay. The defendant in error, therefore, moves either to dismiss or to affirm, and asks that the plaintiff in error be penalized under Rule 23, Section 2 by an award of damages.

The sole question, therefore, for consideration at this time is whether such parts of the record as are presented in the motion clearly indicate that the appeal is taken merely for delay and that the federal questions are frivolous.

Portions of the Record Submitted Not Sufficient.

The court will observe upon examining the paper book submitted by defendant in error that a full record is not submitted but only certain portions thereof. The paper book includes the declaration, the pleas, the instructions given and refused to both sides, the verdict of the jury, the judgment of the Circuit Court, the motion for a new trial, and the order overruling the same, the assignment of errors in the state court, the judgment of the Supreme Court, the opinion of the Supreme Court, the petition for writ of error, the appeal bond and citations, and the assignment of errors to this court. It will be noticed that the portions of the record submitted do not contain any part of the evidence nor any abstract thereof. The court, therefore, does not have before it any information as to the character of the evidence submitted

to the trial court. We respectfully submit that, as will appear later in the argument, it is impossible for this court fully to consider the grounds of the motion unless it is in some way informed of the character of the proof and the issues submitted to the jury as made by the evidence.

The motion is submitted prior to the printing of the record and if it shall appear therefore that the printed portions of the record submitted by the defendant in error will not enable the court to pass properly upon the question, the motion will be denied at this time. The court will not examine an unprinted record, nor will it dispose of a motion unless all portions of the record necessary for it to consider are presented with the motion. See

National Bank v. *Insurance Company,* 100 U. S., 43,

in which it is said:

> "We will not decide motions to dismiss before the record is printed when there is any question about the facts on which the motion rests. In order to get a decision before printing, the motion papers must present the case in a way which will enable us to act understandingly without referring to the transcript on file."

See, also:

Crane Iron Company v. *Hoagland,* 108 U. S., 5.
Waterville v. *Van Slyke,* 115 U. S., 290.

The facts of the case appear only in that part of the record which discloses the evidence offered at the trial, and the necessity for consulting this evidence in order to consider the motion intelligently will appear later. We here make the preliminary point that, for the reasons stated and upon the authorities cited, the court should not at this time consider this motion.

STATEMENT OF THE CASE.

The defendant in error has undertaken to state the case, but in one important particular the statement is erroneous. It is said by the defendant in error in his brief that he was a switchman in the employ of plaintiff in error but not on duty at the time of the injury. It was, however, earnestly contended by the plaintiff in error at the trial and in the Supreme Court of Mississippi that the defendant in error was not in the employ of the plaintiff in error at the time of the injury. There is nothing in that portion of the record submitted which throws any particular light upon this question. The opinion of the court, which appears in the paper book, does not decide whether or not, under the proof, defendant in error was at the time of his injury in the employ of the railroad company. This language is used in the opinion:

> "The evidence for plaintiff discloses that plaintiff had been employed by the railroad company as a switchman; that the day before the injury he had decided to lay off and go to Memphis, and in pursuance of this purpose, he left Jackson on a freight train to go to Canton; he traveled dead head with the permission of the train crew to Canton." (See defendant in error's paper book, page 45.)

We are justified in stating that it was earnestly contended by the railroad company that the defendant in error, Messina, was not an employe at the time of his injury and that it was the duty of the court so to declare as a matter of law. The proper determination of this question depends upon proof offered at the trial shown in the record, to which this court does not have access for the purposes of this motion. Suffice it to say that the record shows that Messina had formerly been in

the employ of the railroad company running as a flagman on one of its trains, but that he had abandoned his employment, had left the place where his duties were performed, without the knowledge or consent of his employer and had in fact severed all relations with the railroad company at the time of his injury. This is an important fact as will presently appear, since the rights of employes in the matter of free transportation are quite different from the rights of non-employes in this particular.

As the opinion of the court shows, this man Messina with certain companions was riding on the tender of a locomotive making a journey from Canton, in the State of Mississippi, to Memphis, in the State of Tennessee. It is said in the opinion of the Mississippi court that he had permission from the engineer to ride on the tender on this interstate journey. If access to the record could be had, there would be disclosed the reason why Messina rode in this dangerous and unusual place rather than in the cars which were provided for passengers. It must be clear to the court that Messina was in effect stealing a ride and was riding on the tender, an unusual and dangerous place, manifestly for the reason that he was not entitled to transportation. It is a matter of common knowledge that the position in which Messina was at the time of the injury is one much favored by tramps and persons seeking to obtain transportation by railroad to which they are not entitled. The opinion of the court shows that the engineer, who was between Messina and the point of danger, ran his train into a washout, thereby causing the engine to be derailed, and Messina, who was riding on the tender, was seriously hurt. If access could be had to the record, it would appear that the passengers in that part of the train allotted to them were not injured at all and that nobody was hurt except these

trespassers who were unlawfully stealing a ride. We submit to the court that the case is unusual, if not unprecedented, in that a recovery for $10,000 was had by a person who was admittedly a trespasser and to whom the railroad company owed no possible duty except the duty not wilfully and wantonly to injure him after full knowledge of his perilous position.

We call attention to the language of the Mississippi court in discussing the conflicting evidence as to whether the engineer had any knowledge of Messina's presence on the train. Thus it is said:

> "About midnight of the next day he and several companions secured the permission of the engineer of the northbound passenger train to ride on the tender of the locomotive from Canton to Memphis. The engineer denied this and said he had no knowledge that the party was on the tender." (Paper book of defendant in error, page 45.)

Again it is said:

> "There is no material conflict in the evidence except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer. This question was a question of fact, and its solution was submitted to the jury. It is conceded by counsel for plaintiff that plaintiff was a trespasser or a mere licensee, and that the defendant owed him no duty except to refrain from wilfully and wantonly injuring him. If the engineer did not know that the plaintiff was riding on the engine, it is conceded that plaintiff must lose his case. Accepting this as a correct interpretation of the law of the case, we find that the disputed question of fact was submitted to the jury." (Defendant in error's paper book, page 46.)

There was here, then, a sharp issue of fact as to whether the engineer and the train crew had any knowledge of this man's presence on the train. It is conceded by the court rendering the opinion that, if the train crew had no such knowledge, there can be no recovery.

The Federal Questions Relied Upon.

As shown by the assignments of error to this court, the plaintiff in error contends that the case is properly here on account of the existence of two separate and distinct federal questions.

(1st) The Supreme Court of Mississippi assumed to decide, and erroneously decided, that the Act to Regulate Commerce, commonly known as the Hepburn Act, does not prohibit or make unlawful the act of a non-employe who secures transportation for an interstate journey without paying therefor. Nor, so the Mississippi court decides, does it prohibit the act of an employe in making an interstate journey without paying therefor and without having complied with the pass rules and regulations made by the Interstate Commerce Commission. (2nd) The court gave such effect to Section 1985 of the Mississippi Code of 1906 as thereby to deprive the defendant in error of its property without due process of law and did deny to it the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. We will consider these in their order and with particular reference to the contention of the defendant in error that these federal grounds are merely formal, are frivolous and cannot be maintained in the light of previous decisions of this court.

The Interstate Commerce Feature.

Section 1 of the Act to Regulate Commerce, as amended June 29th, 1906, contains *inter alia* this provision:

> "No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass or free transportation for passengers except

to its employes and their families, its officers, agents, surgeons, physicians and attorneys at law, etc."

Further along in Section 1 of the act, it is provided:

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense on conviction shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty."

It was contended by the railroad company in the Mississippi Supreme Court that Messina was not an employe and that when he boarded the train at Canton, Mississippi to make the trip to Memphis, Tennessee, without paying anything therefor, he was himself violating the Hepburn Act and was therefore not merely a trespasser but was actually engaged in violating the law and was a lawbreaker. It was therefore contended that, under the rule laid down in Mississippi, which rule will be hereafter referred to, there could be no recovery on the part of Messina. It was urged further that, even if Messina should be regarded as an employe and therefore entitled to transportation, he was actually violating the law at the time of his injury, for the reason that, by Section 20 of the Act to Regulate Commerce, the Interstate Commerce Commission is given authority to prescribe forms of accounts, records and memoranda of every kind, character and description, to require reports to be made in a certain way, etc.; that acting under the authority conferred by this section of the act, the Interstate Commerce Commission had actually promulgated a number of regulations governing the issuance of passes by Section 26 of which it is further provided that no persons can be carried without passes, except train crews,

sleeping car, chair car, and dining car employes, express messengers, crews of private cars, newsboys on trains, baggage agents and persons who have been in wrecks, etc. Whenever employes of any other class desire to obtain transportation they must apply to certain officers of the railroad company and passes must be issued on forms prescribed by the Commission and signed by certain officers of the company. It was, therefore, contended by the railroad company that, since Messina had admittedly not complied with these regulations, he was engaged in violating the law at the time of his injury, even though he were an employe. It was, however, earnestly insisted by the railroad company that the undisputed proof in this case shows he was not an employe.

We here now assert that, if the court could have access to the record, it would appear that Messina was not an employe. In view of the fact that the defendant in error has not seen proper to print and submit to the court the portions of the record showing the evidence on this point, we insist that the motion must either be dismissed for the lack of sufficient record, or, if this is not done, that the court will at least in considering this motion indulge the presumption that Messina was a non-employe at the time of his injury.

The ground for the motion to dismiss or affirm as to this particular federal question is based entirely upon the decision of this court in the case of

Southern Pacific Co. v. *Schuyler*, 227 U. S., 601.

It is really scarcely necessary to do more than to point out the quite obvious reasons why the Schuyler case is not decisive of the case at bar. To express the matter in a sentence, the distinction between the cases rests upon the difference in the course of decision in the State of Utah and the State of Mississippi in a particular which

we shall presently point out. There is some intimation in the brief on behalf of the motion that the question arising under the Hepburn Act was not properly pleaded in the lower court, but of course this suggestion is without merit, since, as is admitted in the brief for defendant in error, the Supreme Court of Mississippi did consider the question and did construe the Act to Regulate Commerce. Whether the question was raised in time or in the proper manner in the state court is manifestly of no consequence, since the state court did actually assume to decide the question. See

Beer Co. v. *Massachusetts,* 97 U. S., 25.
Lavagniono v. *Uhlig,* 198 U. S., 443.
Montana ex rel. Haire v. *Rice,* 204 U. S., 291.

It is settled law in Mississippi that, upon grounds of public policy, the courts will not lend their aid to a party who grounds his action upon an immoral or illegal act.

Western Union Telegraph Co. v. *McLaurin,* 66 Sou. Rep., 739 (not yet officially reported).

In the McLaurin case it appears that the telegraph company had negligently delivered to McLaurin's mother a telegram addressed to McLaurin. The telegram was from a woman with whom McLaurin sustained illicit relations. The court held that the plaintiff in that case could not recover because, however great might be the wrong done him, however gross the negligence, however wanton the disregard of its public duty by the telegraph company, plaintiff would come into court with unclean hands and that no judgment could be rendered in his favor. The opinion of the court is based largely upon the statement of the law in

Cooley on Torts, Vol. 1, page 172,

from which there is an extended quotation in the opinion. The Mississippi court uses this language:

"The plaintiff cannot travel to actual damages without the aid of his immoral acts, and it is the policy of the state to deny the plaintiff the assistance of the courts for the recovery of such damages. On the other hand, public policy permits the imposition of punitive damages in the interest of the public, without regard to the pecuniary interests of the individual suing.

We think the apparently conflicting principles may be harmonized by holding that, when it appears that plaintiff's right of recovery is based upon his own wrongs, the courts will bring his case to an end and disregard the wrongs of the defendant. * * * It was wrong, of course, for the telegraph company to disclose the contents of the telegrams, but the disclosure would not and could not cause any actual injury to complainant, except for his own immoral practices."

It will thus at once appear that the railroad company, in presenting the defense that Messina at the time of his injury was engaged in violating the federal act sought to bring itself within the rule previously announced by the Mississippi court in the McLaurin case. It was there held that McLaurin could not recover, although he had been wronged, either actual or punitive damages because the wrong which he suffered at the hands of the telegraph company was so connected with his own immoral acts as that he (McLaurin) would not have been injured had he not himself been engaged in an unlawful course of conduct. So, the railroad company says in the instant case that Messina would not have been injured had he not been engaged in an illegal act, to wit, the violation of a federal law. There is, of course, no reason why the immoral conduct of McLaurin should prevent him from recovery and the illegal conduct of Messina should not have a like effect. The injury would not have happened to Messina had he not been violating the law. To use again the language of the Supreme

Court of Mississippi, he cannot proceed with his case without himself showing that he was engaged in violating an act of Congress.

The relevancy of the point that Messina was violating the law becomes quite obvious in the light of this decision of the Supreme Court of Mississippi. Whether it was a state law that was violated or a federal law that was violated is, of course, quite unimportant. The Supreme Court of Mississippi had laid down the rule that no one could recover for tort if, in the course of making his proof, it becomes necessary for him to show that he was himself violating the law. The railroad company, therefore, said to the Supreme Court of Mississippi, 'We ought not to be required to pay this judgment because Messina was a lawbreaker at the time when he received his injuries.' It so happens that the law which he was breaking was a federal law, but it was none the less a law, which Messina was bound to observe. In view of the course of decision in Mississippi and the point presented, it therefore obviously became necessary for the Supreme Court of Mississippi to decide whether in fact Messina was violating a federal law. The law which it was charged that Messina had broken and was in the very act of breaking at the time of his injury was the Act to Regulate Commerce. The railroad company said in its argument to the Supreme Court of Mississippi:

> 'Messina was a non-employe who was stealing a ride from Canton, Mississippi, to Memphis, Tennessee. It is against the law for a person to secure interstate transportation without paying therefor. Consequently, when Messina developed his case it appeared from his own evidence or from the evidence which he produced that he was a lawbreaker, and, under the rule in Mississippi, he cannot recover.'

The Supreme Court of Mississippi seems to have recognized that this was a perfectly valid defense, provided,

of course, that the federal statute made Messina a law-breaker. What the Supreme Court of Mississippi did was to construe the federal statute and decided that the federal statute did not prohibit the act which Messina was engaged in doing. The Supreme Court of Mississippi did not say, as did the Supreme Court of Utah in the Schuyler case, that even if the plaintiff was violating the federal law, he would yet have a right to recover under the local law of the state where the accident happened and where the cause was tried. Let us see precisely what the Supreme Court of Mississippi decided in this case. (See pages 51 and 52 of defendant in error's paper book.)

After quoting the statute, the court uses this language:

> "We do not understand that the act of Congress referred to has any application to the facts of this case. The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling a passenger train under no conceivable circumstances has any power to issue free transportation to any person, and we are unable to see the force of the argument along this line. Certainly, a common carrier would not be liable to the penalty provided by the act of Congress should some employe, having no sort of connection with the transportation of passengers, assume to issue a free pass to some prohibited passenger. If an engineer could lawfully permit a person to ride free, it seems to us that the plaintiff in this case would be entitled to the same degree of care that other passengers are entitled to receive. This seems clear, unless the act of Congress would change the rights of the passenger. It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the act of Congress is not directed against acts of the character here involved. As we interpret the act of Congress and the regulations adopted by the Interstate Commerce Commission, neither are directed against acts such as are disclosed by the record in this case."

Here is an express declaration by the Mississippi court that the act of Congress is not directed against the character of acts involved in this case. That is to say, it is an express adjudication by the Mississippi court that one who steals a ride on an interstate train is not violating the act of Congress which prohibits the securing of free transportation. The language used by the Mississippi Supreme Court is perfectly clear and is an express holding that Messina was not violating a federal law. Of course, if Messina was not violating the law, the entire argument based on the decision in the McLaurin case, *supra*, falls to the ground. The Supreme Court of Mississippi never intimates that Messina could recover, even though a lawbreaker. The holding is that he was not a lawbreaker. Therefore, the decision of the Supreme Court of Mississippi directly brings into question a federal statute and construes this federal statute. For the purposes of this discussion, it is of no particular consequence as to whether that federal statute was construed correctly or not. The very fact that the state court undertook to construe the statute raises a federal question.

No decision of the Supreme Court of the United States can, of course, be produced which will hold that a man stealing a ride does not violate the federal statute, and, therefore, it cannot be argued that this question has been settled and that we are precluded from presenting the question again to the court. As a matter of fact, it is quite clear that the federal statute is violated whenever a non-employe obtains free transportation, whether it is in the form of securing a pass to which he is not entitled or whether he rides without any pass at all. Apparently, the Supreme Court of Mississippi proceeded upon the theory that, before the federal act could be violated, the person not entitled to transportation must

secure a pass of some kind and that one who goes on a train without paying fare and without a pass does not violate the law, even though he makes an interstate journey.

This statement of the status of the case shows clearly the difference between the case at bar and the Schuyler case (37 Utah, 581). It appeared that Schuyler was a mail clerk who held a commission from the government. This commission entitled him on its face to ride on the trains free, provided he rode in the mail car. The act of Congress, known as the Hepburn Act, was thought to prohibit the free transportation of a mail clerk unless the mail clerk was traveling on business for the government. This was a construction put upon the act by the Interstate Commerce Commission. Schuyler had made a purely personal journey from Ogden, Utah, to Oakland, California, and was injured while returning from Oakland to Ogden. The Supreme Court of Utah held that, at the time of the injury, Schuyler was not traveling on government business but was traveling on a purely personal mission. The Utah court held that the act of Congress did not prohibit a mail clerk from riding as Schuyler was, and that he was entitled to free transportation, even though he was not traveling on government business. In this respect, the decision of the Utah court in the Schuyler case is precisely analogous to the decision of the Mississippi court in the case at bar. If the Utah court had stopped there and the case had gone to the Supreme Court of the United States simply upon the correctness of the Utah court's construction of the federal act, the case would have been in principle precisely like the instant case. But the Utah court went further. It said that, even conceding for argument's sake that Schuyler was violating the federal act, yet under the law of Utah this did not prevent his recovery,

since he had been accepted as a passenger by the railroa company in good faith, and since it appeared that Schuy ler himself was acting in perfect good faith in enterin the car and making the trip. The Utah court points ou at great length that the Act to Regulate Commerce ha gone into effect only a short time before the injury; tha its construction was not generally known or understood that Schuyler never for a moment doubted that he had right to make the trip; and that the railroad compan was also of that opinion. The Utah court said, there fore, in effect, that Schuyler in good faith submitte himself as a passenger and the railroad company i good faith accepted him as a passenger, there being i the mind of nobody any question of a violation of the law Under these circumstances, said the Utah court, we set tle it as a matter of local law that this man is entitled t a recovery. This was the attitude of the case when it reached the Supreme Court of the United States. What the Supreme Court decided in the Schuyler case was that it had no right to interfere with the local law of Utah and require the courts of Utah to say that one who is violating an act such as this is thereby precluded from recovery.

Mr. Justice Pitney points out that the relation of carrier and passenger in the case of gratuitous passage under circumstances such as existed in the Schuyler case is a question of state law and not a question of federal law. That is to say, he recognizes that it is entirely within the competency of the local courts to say that one may recover even though he is violating the law. That the law brought under review happens to be a federal law is of no importance whatever unless this federal act carries within itself some provision which will prevent recovery. The Supreme Court of the United States did not go into the question except to decide that the

federal act is not of such a nature as to preclude a state court from permitting a recovery by one who was guilty of a technical violation of it. The only thing decided in the Schuyler case is that the Hepburn Law provides a penalty for its violation and that this is the only punishment which the federal authorities can impose upon one who violates it. The Supreme Court says in the Schuyler case that certain penalties are imposed by the Hepburn Law for its violation and that, when these penalties are paid, the federal authorities are satisfied. The exact language of the court is this:

> "As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn Act is such as to deprive one who, in good faith and without fraud and with the consent of the carrier but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care."

The precise thing, and the only thing, decided in this case is that the Hepburn Law is not of such a character as to prevent a local court from holding that one who violates it does not necessarily thereby lose his right to damages. Note particularly that the court time and again in this opinion lays emphasis upon the fact that the Hepburn Law does not prevent the plaintiff from taking advantage of the local law. Now, if the Supreme Court of Mississippi, in the opinion which we have under review, had said that it admitted that Messina was violating the federal law, but under the Mississippi law this did not prevent him from recovering, we would have a case like the Schuyler case. But the Mississippi Supreme Court said no such thing. In fact it could not have said so without overruling the McLaurin case, to

which we have called attention. What the Mississippi Supreme Court held was that Messina was not violating the federal law, and if he was not, then, of course, the argument of the railroad company was without value.

Learned counsel for the defendant in error in this case admits that the Supreme Court of Mississippi construed the federal act and admits, therefore, that upon its face the Supreme Court of the United States has jurisdiction of this writ of error, but it says that the Supreme Court of the United States has decided that a man is entitled to recover even though he is violating a federal law. The Supreme Court of the United States has decided no such thing and could have no right to decide such a thing. That is purely a state question and is left for the local courts to decide. The Supreme Court of the United States has merely said that, if the local courts have decided that a law violator can recover, it will not interfere merely because the law alleged to be violated happens to be the Hepburn Act. It is difficult to imagine how anything else could be held.

But suppose the Supreme Court of Mississippi had said expressly that, 'According to our policy, Messina could not recover if he were violating a federal act, but we hold he was not violating a federal act,' would the Supreme Court of the United States say to the Mississippi Supreme Court, 'You have no right to say that one who is violating this act cannot as a matter of local law be prevented from recovery?' Obviously, this is a state question with which the Supreme Court has nothing to do. Counsel for defendant in error cite a number of authorities from other states which they contend support the view that Messina could recover even if he was violating the law. We are not concerned with such authorities. They do no more than to declare the law

in various states. None of them are Mississippi authorities. The only thing which is relevant here is the law of Mississippi on the question of a lawbreaker being allowed to recover. We produce a case which clearly shows that one who is violating a law cannot recover. This is enough for the Supreme Court of the United States. The only thing that the Supreme Court of the United States is called upon to decide upon this point is whether the Supreme Court of Mississippi correctly held that Messina was not violating the law at the time of his injury. Whether that construction is correct or not is admittedly a federal question. As said in the Schuyler case, in Mr. Justice Pitney's opinion:

> "Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employes of the Railway Mail Service when they are not on duty but are traveling for their own benefit and pleasure, is, of course, a federal question." (See page 610 of the opinion.)

We think it unprofitable to argue elaborately upon the proposition as to whether the Supreme Court of Mississippi was correct in its holding that Messina was not violating a federal law when he steals a ride. Certainly, this question is sufficiently doubtful to permit the plaintiff in error here to present it to the Supreme Court. No one will contend that this question is purely formal or that it has been so settled by previous adjudications of the court as to make the federal question frivolous. As a matter of fact, any argument that one who steals a ride is not violating the federal act is probably sufficiently without basis as properly to be characterized as frivolous. The act by its very terms makes it an offence for anyone to accept transportation without paying the regular fare. One certainly accepts transportation just as much by stealing a ride on the tender with or without the consent of the engineer as he would if he secured a pass

and rode in the passenger car. Nothing can be paid for transportation except money. A familiar line of authorities settles this question:

C. I. & L. R. R. Co. v. *United States,* 219 U. S., 486.

L. & N. R. R. Co. v. *Mottley,* 219 U. S., 467.

But this is not the place nor the occasion for arguing the merits of the case. We respectfully submit that the federal question which we raise here is by no means frivolous; that it has not been touched by the decision of this court in the Schuyler case nor in any other case; and that we are entitled to present the question to the Supreme Court upon full argument and in the regular course of procedure in this court.

THE QUESTION ARISING FROM THE APPLICATION TO THIS CASE OF SECTION 1985 OF THE MISSISSIPPI CODE.

Section 1985 of the Mississippi Code of 1906, as amended by the Act of March 6, 1912, Mississippi Laws of 1912, Chapter 215, page 290, reads as follows:

> "In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives, or cars of any such railroad corporations or such other corporation, company, partnership or individual shall be *prima facie* evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This section shall also apply to passengers and employes of railroad corporations and of such other corporations, companies, partnerships and individuals."

It is perhaps unnecessary for the plaintiff in error, for purposes of this motion, to discuss at any length the question raised by it as to the application of Section 1985 of the Mississippi Code commonly known as the *prima facie* statute, for, if the interstate commerce question heretofore discussed presents a serious question, or if the point involved in that part of the case has not been foreclosed by previous adjudications of this court, it cannot be said that the appeal was taken merely for delay and that the federal question is so frivolous as to justify this court in dismissing the case without giving plaintiff in error an opportunity to be heard. However, we will briefly, and merely in outline, indicate the nature of the question which we desire to submit as to the application of Section 1985.

The plaintiff in error does not contend that Section 1985 of the Mississippi Code properly applied is unconstitutional. We concede that this question is put to rest by the decision of this court in the case cited by defendant in error—

Mobile, Jackson & K. C. R. R. Co. v. *Turnipseed*, 219 U. S., 35. In that case it was held that Section 1985 was merely a rule of evidence and that it was within the competency of the legislature to prescribe a rule of evidence of this character without infringing upon the guaranties of the Federal Constitution. Our contention here, however, is that Section 1985 was not so applied by the Mississippi courts; that it was given an effect other than a mere rule of evidence; that it was so applied under the peculiar facts of this case that it became not a rule of evidence but was used to create a presumption of liability; and indeed, was so applied as to deny to the plaintiff in error one of its substantial defenses. This court is ordinarily not concerned with the constitutionality or

unconstitutionality of a particular statute unless it is so applied in the particular case as to deny to a citizen of the United States some of its rights under the Federal Constitution. It might well be that Section 1985 in one case would involve no violation of a federal right, while in another case it might be so applied by the state court as to involve a violation of the guaranties of the Fourteenth Amendment.

In the Turnipseed case, *supra*, Mr. Justice Lurton, as the organ of the court, after holding that this statute did no more than create a presumption of fact which was rebuttable, and which should yield to the proven facts of the case, held that it was not a denial of the equal protection of the law because it did not create a presumption of liability, its operation being merely to supply an inference of liability in the absence of other evidence contradicting such inference. The court guards this opinion, however, by this qualifying observation:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present this defense to the main fact thus presumed.
>
> If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

The court thereupon held that these principles had not

been violated in the particular case under consideration and therefore no federal right had been denied to the railroad company in that case. If, however, it can be shown to the court that, in the instant case, this statute was so applied as to deny to the railroad company the right to make substantial defenses, it is clear that the court would reverse the case and hold that the statute had been improperly applied.

It is quite true that the Supreme Court of Mississippi, following the intimations in the Turnipseed Case, has held that Section 1985 is a mere rule of evidence and that it has no application in a case where all the facts are proven and where there is no room for inference and where nothing is left to be inferred from the fact that the injury was inflicted by a running train. We have no quarrel with the interpretation put upon this statute by the Supreme Court in other cases. Our contention, however, is that in this particular case the Supreme Court of Mississippi departed from its own rule and from the rule laid down by the Supreme Court of the United States in the Turnipseed Case and reaffirmed by that court in the case of *Easterling Lumber Co.* v. *Pierce,* 235 U. S., 380. Had the Supreme Court applied in the instant case the rule which it laid down in the case of *Railroad Company* v. *Thornhill,* 63 Sou., 674 (not yet officially reported), and in the case of *Alabama Great Southern R. R. Co.* v. *Daniell,* 66 Sou. Rep., 730 (not yet officially reported), we would have no reason to complain.

In the Daniell Case, *supra,* in that part of the opinion quoted in defendant in error's paper book at pages 9 and 10, it is well said that, when all the facts and circumstances have been ascertained, the *prima facie* statute, Section 1985, ceases to perform any function and that

the case, after full disclosure of all the facts, should be decided not upon the presumptions in the statute but upon the proven facts in the case. Substantially to the same effect is the Thornhill Case, mentioned in defendant in error's paper book at page 9. Had these rules been applied to the instant case, certainly the statute would have presented no instance of an application which would infringe upon the railroad company's constitutional rights under the Fourteenth Amendment. But the difficulty here is that the statute was not so applied. A careful reading of the opinion of the Mississippi court shows that a number of errors were committed on the trial, but the court held that these errors were not sufficient to reverse the case. It is apparent from a reading of the opinion that this case was not a proper one for the application of Section 1985. The Supreme Court of Mississippi, as we have just pointed out, has repeatedly held that, where all the facts and circumstances are disclosed, then the presumption created by the statute must yield to the facts proven in the case and has no application. In this case the court says (page 46, defendant in error's paper book):

> "There is no material conflict in the evidence except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer."

That is to say, the evidence fully disclosed precisely how the train was being run, at what rate of speed, under what circumstances, etc. The only point of serious dispute, according to the finding of the Mississippi court, was as to the knowledge of the engineer in regard to Messina's presence on the train. This was, therefore, a case in which the *prima facie* statute clearly had no application and in which it performed no function. Yet we find by examining instruction No. 4 (defendant in

error's paper book, page 32) that the *prima facie* statute was invoked and was invoked in such a peculiar way as to cut off the railroad company from one of its important defenses, as we shall presently more particularly point out. At this time we make the point that, since all the facts and circumstances surrounding the operation of the train had been proven, it was error to invoke the statute at all. This is practically admitted by the Mississippi court, yet it was held that the case was of such a nature that the error was not a reversible error. We are, however, confronted with a case in which error was committed by injecting the *prima facie* statute when, under the decisions of the Mississippi court in the Thornhill Case and the Daniell Case, there should have been no such injection of the statute into this case. The court will be interested in examining this Daniell Case, since it appears in that case that the Supreme Court held that it was error to invoke the *prima facie* statute in view of the fact that all the facts and circumstances had been proven and this error in the Daniell Case was sufficient to reverse. The court in that case very properly said that it was reversible error to invoke the statute in a case where it had no application and where the railroad company had presented proof showing all the circumstances surrounding the injury. Yet, in the instant case, which was a most flagrant instance of a violation of this rule, the court refused to hold that the error was reversible.

Not only did the court refuse to follow its own rule in the particular mentioned, but this fourth instruction is demonstrably erroneous in another particular, and this error is of such a nature as to prevent the railroad company from presenting its most important defense. When the instruction is carefully examined, it is seen that it

not only invokes the *prima facie* statute in a case where that statute, by the decisions of the Supreme Court of Mississippi, has no application, but it invokes it in such a way and in such language as to prevent the defendant railroad company from ever submitting to the jury what was the most important question of fact in this case, that is to say, the knowledge of the engineer as to the presence of Messina on the train. It will be remembered that the Mississippi Supreme Court points out that the engineer denied he had any knowledge that Messina was on the train, and the Mississippi court further holds that, if the engineer did not know of Messina's presence, there could be no recovery. The Mississippi court held, however, that this question of fact was submitted to the jury. It is our contention here that this instruction No. 4 prevented the submission of this particular question to the jury. Let us see if it did not.

The instruction begins thus:

> "You are instructed that the plaintiff was injured by the running of defendants' train, and that therefore the defendant is presumed to have been negligent, and the burden is upon the defendant to show to you by satisfactory evidence that it was not liable, and by the same evidence to exonerate itself from blame."

So much of the instruction amounts, perhaps, to no more than the invocation of the *prima facie* statute in a case where it should not be applied, since all the facts and circumstances were fully disclosed by the proof. The Daniell Case, *supra*. But the next sentence is the one which does the mischief and about which we complain particularly in this connection, since it cuts the railroad company off from one of its most important defenses. This language is used in the instruction:

> "If all the evidence leaves it doubtful, or a matter of conjecture as to how the train was being run

> by the defendant's servants in charge of it, then the defendant has not met the burden, and it is your duty to find for plaintiff full damages, etc.,"

the rest of the instruction being addressed to the measure of damages. How can it be said that the jury ever gets to the consideration of the question as to whether the engineer knew of Messina's presence on the tender? This instruction charges the jury that, if the evidence leaves it doubtful as to how the train was being run, there must be a verdict for the plaintiff. The important and vital issue in this case as to the knowledge of the engineer is put to one side, and the jury is in effect instructed that it has no bearing on this case. This issue had nothing to do with the running of the train. It is an issue entirely outside of the question of the negligence of the railroad company. The railroad company might be ever so negligent and under the very finding of the Supreme Court in this case there would be no liability if the engineer was ignorant of Messina's presence. Yet the jury is instructed here not simply that the proof of injury is sufficient to warrant a finding of negligence on the part of the railroad company, but that proof of injury by running trains is sufficient to find a verdict, utterly ignoring the question as to the engineer's knowledge of Messina's presence. It is easy to understand that a jury with this instruction before it, and being charged by the court that if the evidence leaves it doubtful as to how the train was being run they should find for the plaintiff, would be justified in bringing in a verdict without ever reaching the question as to the engineer's knowledge. It may be said, however, that this is an argument which we should have addressed to the state court, and that this court is not concerned with the question. But it must be remembered that if this *prima facie* statute, which we are here considering, is so

applied as to make it more than a rule of evidence and so applied as to cut the defendant off from one of its substantial defenses, it then does become a federal question since the statute so applied in the particular case operates to deprive the defendant of its property without due process of law and to deny to it the equal protection of the law. The statute is directed, of course, principally against railroad and other companies and individuals engaged in operating dangerous agencies. This has been held to be a proper classification, and it has been said that, if the *prima facie* statute, so-called, does no more than to require an individual or corporation operating these dangerous agencies to produce evidence as to how the accident happened, then it is no denial of due process and no denial of equal protection of the law, since, as observed, the classification is reasonable and the rule amounts to no more than a rule of evidence. But if this *prima facie* statute is to be so applied as to cut the defendant off from a perfectly valid defense which has no connection whatever with the operation of the train, then it becomes far more than a rule of evidence and becomes a rule of liability which has no reasonable relation to the question of dangerous agencies, this underlying, of course, the holding that the classification is proper. This rule of evidence, be it observed, is a rule which the court may adopt in order to throw light upon the question of whether the railroad company is negligent in the operation of its trains. Negligence is presumed from the fact of the injury. But the railroad company should not by an improper application of the statute, be required to respond in damages where it has a defense which is sufficient to destroy the plaintiff's claim, even though the defendant be found to be negligent.

It is said, however, that this question of the knowledge of the engineer was submitted to the jury in other instructions and that therefore the fourth instruction is harmless even though erroneous. There is only one other instruction on the subject which could possibly be construed as submitting this question to the jury. That is instruction No. 2 found on pages 30 and 31 of defendant in error's paper book. That instruction is not upon the *prima facie* statute. In this instruction, it is true, reference is made to the knowledge on the part of the engineer of Messina's presence on the train, but that reference is not prominent, and what is controlling here, it is a general instruction having no reference to this rule of evidence provided in Section 1985 of the Code.

It is easy to imagine that a jury, taking the whole body of instructions, would first read instruction No. 2, laying down the general principles which should control recovery. But when it gets to instruction No. 4, it is found that the court applies a statute having a special and particular application, and the jury finds that, under this statute, it is the law that, if the evidence leaves it doubtful as to how the train was being run, there should be a verdict for the plaintiff. This, in spite of the previous general instruction which makes some reference to the engineer's knowledge. In other words, this second instruction deals with what the plaintiff must prove. The fourth instruction, however, deals with the method by which this proof can be made. It is said in the second instruction that the jury must believe from the evidence that the plaintiff was an employe; that he was riding on the train with the knowledge of the engineer; and that the train was run in a reckless, wilful and wanton manner. This is what the jury must believe before it can find a verdict. But the fourth instruction advises

them that, if the evidence leaves it doubtful as to how the train was being run, this is sufficient basis for them to believe all the facts set out in the second instruction and necessary to find a verdict. They must, of course, find the facts in the second instruction, but the fourth instruction informs them that, in view of this *prima facie* statute, they may find all the facts required by the second instruction merely by finding that the evidence has left it doubtful as to the manner in which the train was operated. This being certainly the effect of the court's instructions, it is quite clear that the *prima facie* statute has by the court been so applied as to deprive the railroad company of its defense on the merits and that it has been denied in this way due process of law and the equal protection of the laws.

There is another vice in this fourth instruction which is quite obvious. The language used is that, if the evidence leaves it doubtful or a matter of conjecture as to how the train was being run, etc. This is a stronger burden placed upon the defendant than rests upon the state in a criminal case. The instruction does not even say that the doubt must be a reasonable one. It is said that there must be a verdict for the plaintiff if the evidence leaves it doubtful. The error of this form of instruction is clearly demonstrated by the opinion of the Mississippi Supreme Court in a previous case. See

Gentry v. *Gulf & Ship Island R. Co.*, 67 Sou., 849 (not yet officially reported).

In that case, which did not arise under the *prima facie* statute, an instruction was given at the instance of the defendant railroad company to the effect that, if the jury is in doubt as to whether plaintiff was injured or not in the derailment of the train, and this doubt cannot be removed by a clear preponderance of the evidence,

the verdict should be for the defendant. The court uses this language in reversing the case:

> "This instruction imposes on a plaintiff a greater burden than the law imposes on the state in a criminal trial. In a criminal trial the state must prove its case beyond all *reasonable* doubt. By this instruction the plaintiff must remove *all* doubt from the minds of the jury—and that is not all; the plaintiff must remove *all* doubt—'by a *clear preponderance* of the evidence.' The plaintiff must establish his right to recover by a preponderance of the evidence. Whenever the jury is satisfied that the plaintiff has proven his case, the plaintiff is entitled to recover. The law imposes on the plaintiff no burden to remove all doubts from the minds of the jury.
>
> This instruction is misleading, and calculated to do much harm. Lawsuits must be tried under reasonable rules and regulations. It is reasonable to require the party who asks relief to satisfy the jury that he is entitled to it. It is unreasonable to require the plaintiff to remove all doubts which may find lodgment in the brain of some skeptical juror. This instruction, and others in this record, cast on the plaintiff this burden."

Here the Mississippi court very properly reversed a case which had been decided in favor of the defendant on the ground that an instruction which required a verdict for the defendant if the evidence was doubtful, was not only erroneous but constituted reversible error. But in the instant case we are told that the burden is upon the defendant to show that the train was not negligently run and that if the evidence left it doubtful, etc. Any doubt is sufficient. It need not be a reasonable doubt, or a doubt for which a reason can be given, or a doubt based upon any reasonable ground. Unless all doubt is removed by the defendant railroad company, there must be a recovery. We respectfully submit that it is not the equal protection of the law to take a statute applicable only in civil cases and so apply it as to subject the de-

fendant to a burden greater than that carried by the state in a criminal case. If it be a reasonable classification to require corporations and individuals operating dangerous agencies to produce evidence as to how the accident happened, does that fact authorize the court to go further and say to this class of litigants, 'You must not only show how the accident happened and relieve yourself from blame, but you must remove all doubt from the minds of the jury. We take you out of the class of all other litigants in civil cases and subject you to the necessity for producing a degree of certainty in the proof which is even more severe than is imposed upon the state for the protection of its citizens in the trial of criminal causes.' This is not to apply the statute simply as a rule of evidence, it is to subject defendants to whom it applies to an unfair and unjust rule of liability and to make it impossible for the defendants to escape liability provided a juror can be found whose mind is of such an order as that there should be lingering doubts upon the question of negligence.

It will be observed that, in this case, the Supreme Court of Mississippi found that this instruction was erroneous, and the court admits (see page 47 of defendant in error's paper book) that this language places a greater burden upon the defendant than the law requires it to sustain. Why should an error of this kind be sufficient to reverse a case at the instance of the plaintiff (the Gentry Case, *supra*), and the court hold that the same effect is not brought about in the case of the defendant's appeal?

We submit, therefore, that the federal question raised by us with reference to Section 1985 is far from frivolous and that we are entitled to an opportunity to present the matter fully to the court. We ask, therefore that

the motion be overruled, or at least postponed until the hearing of the case upon the merits.

Respectfully submitted.

R. V. FLETCHER,
BLEWETT LEE,
EDWARD MAYES,
Attorneys for Plaintiffs in Error.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No.———

ILLINOIS CENTRAL RAILROAD CO., et al,
Plaintiffs in Error.

vs.

V. P. MESSINA,
Defendant in Error.

Now comes the defendant in error, V. P. Messina, and moves the Court to dismiss the writ of error in this case to the judgment of the Supreme Court of the State of Mississippi, for the want of jurisdiction, because,

First. The Federal questions presented are wholly formal, and so absolutely devoid of merit as to be frivolous, and have been so explicitly foreclosed by the decisions of this Court as to leave no room for real controversy.

If the writ of error shall not be dismissed, defendant in error moves that the said judgment of the Supreme Court of the State of Mississippi be affirmed on the ground that although, in the opinion of this Court, the record may show that this Court has jurisdiction.

It is manifest that the said writ of error was taken for de-

lay only, and that the questions on which the decision of the cause here, depends are so frivolous as not to need further argument. (Rule 6, sub-division 5.)

Wm. H. Watkins

Attorney for Defendant in Error
for the Purposes of This Motion.

Barbour Henry

Buck & Stricker

of Counsel.

NOTICE OF MOTIONS.

To above named Plaintiffs in Error, and to Edward Mayes, Jackson, Mississippi, Attorney of Record for Plaintiffs in Error:

You, and each of you, are hereby notified that the Defendant in Error, in the above cause, will, on Monday, November 1st, 1915, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for consideration of the said Court, the foregoing motions, and each of them, and the brief thereon, including portions of the record hereto attached, and served upon you herewith.

Wm. H. Watkins

Attorney for Defendant in Error
for the Purposes of This Motion.

Barbour & Henry

Buck & Stricker

of Counsel.

STATEMENT OF THE CASE.

This is a personal injury case. The Defendant in Error, V. P. Messina, a young man, received permanent injuries while riding on the tender of one of the locomotives of one of the Plaintiffs in Error, Illinois Central Railroad Company.

The facts as found by the jury in the trial court, and sustained by the Mississippi Supreme Court are as follows: Defendant in Error was a switchman of the Plaintiff in Error, but not then on duty. He was given permission by the engineer of the Illinois Central Railroad Company, one of the Plaintiffs in Error, to ride on the tender of the locomotive of its passenger train, then engaged in interstate commerce, from Canton, Mississippi, to Memphis, Tennessee. While so riding, he was injured by a derailment of the locomotive and a part of the train, due to the track being washed away, and then under water waist deep. The engineer giving permission had received warning from the train dispatcher that the track over which his train must shortly run was under water between two stations (Beaty and Sawyer.) The engineer, with the warning in mind, ran his train over the identical track covered by the warning, at a rate of fifty miles an hour, in the night time, during a misting rain, with a headlight which lit up the track only twenty-five yards ahead. He was able to stop his train, at the rate of speed admitted by him, within a distance of one hundred and fifty yards. While so running, the train went into the water, over the track, and after running one hundred yards, the engine turned over, causing the injury to Defendant in Error. In short, the engineer, by his own admission, was running his engine under circumstances which caused the Mississippi Supreme Court, in its opinion, to characterize it as "so flagrant that the court would have been warranted in instructing the jury peremptorily that his conduct was wanton and in reckless disregard of the consequences."

The Defendant in Error received his injury at about 3:20 in the morning, and contended that he was taken in charge by one of the Plaintiffs in Error, Illinios Central Railroad Com-

pany, and uselessly and in violation of rules of humanity, was allowed to lie in his wounded condition until nearly noon of the day of his injury, without medical aid, although the Plaintiff in Error had its hospital and physicians three miles away, to which other injured persons were promptly carried. As a result of this exposure he claimed, and proved, his injuries were greatly increased.

These two theories of Defendant in Error, to-wit: His injury by the wilful, wanton, and gross negligence of the engineer of the Plaintiff in Error, in the operation of the train, and his needless and negligent exposure under the facts, were submitted to the jury, under evidence and instructions which the Mississippi Supreme Court held to be without error. Defendant in Error, upon these issues, recovered a judgment in the Circuit Court of Holmes County, Mississippi, for $10,000.00, and this judgment was affirmed by the Supreme Court of Mississippi. The writ of error to this court is from that judgment.

Neither during the trial of the case in the Circuit Court, by the evidence, pleading, or instructions, or in the motion for a new trial, was there any Federal question raised, or even intimated. In the assignment of errors in the State Supreme Court no such question was raised, but in a supplemental or reply brief by the Plaintiffs in Error, one of the Federal questions, here relied on, was raised, to-wit: The alleged violation by the Defendant in Error of Sections One and Twenty of the Hepburn Act. The Supreme Court of Mississippi, however, in response to the argument by Plaintiffs in Error, did construe that Act as shown by its opinion.

The Supreme Court of Mississippi held that the Hepburn Act, approved June 29th, 1906, and amended April 13th, 1908, and June 18th, 1910, and the regulations promulgated thereunder by the Interstate Commerce Commission, had no application to the case at bar.

In this Court it is assigned for error:

First. That the Plaintiffs in Error were, in violation of

the Fourteenth Amendment to the Constitution of the United States, deprived of their property without due process of law, and were denied the equal protection of the law, because the Mississippi Supreme Court, by its decision and judgment, applied the provisions of Section 1985 of the Mississippi Code of 1906.

Second. That the Supreme Court of Mississippi committed error in holding and adjudging that Sections One and Twenty of the Act of Congress to regulate commerce, commonly known as the Hepburn Act, approved June 28th, 1906, and amended April 13th, 1908, and June 18th, 1910, did not bar the right to recovery, because of a violation thereof by the Defendant in Error, and further in holding that the prohibitions, penalties and disabilities arising under said Act of Congress, did not apply in an instance like the case at bar.

Third. That the Supreme Court of Mississippi erred in holding that the rules and regulations issued and promulgated by the Interstate Commerce Commission under authority of Section 1 of said Hepburn Act, and amendments thereto, were not violated by the Defendant in Error under the facts of the case at bar, and therefore constituted no defense thereto.

STATEMENT AS TO THOSE PORTIONS OF THE RECORD PRINTED AND APPENDED HERETO.

For the purposes of this motion, the Defendant in Error, pursuant to the rules and practice of this Court, has caused to be printed and attached to this brief "portions of the record embodying all of the material and pertinent parts of the transcript, which relate to the motion filed herein," omitting those parts of the transcript which are not essential to the proper consideration of the motions.

> Carey vs. Houston & T. C. R. R. Co., 150 U. S. 179;
> Walston vs. Nevin, 128 U. S. 578.

MOTION TO DISMISS.

This motion is based upon the claim, which, we respectfully submit, is patent, that the alleged Federal questions are wholly formal, are so devoid of merit as to be frivolous, and have been so explicitly foreclosed by the decisions of this Court as to leave no room for real controversy. Mr. Taylor, in his work on Jurisdiction and Procedure in the United States Supreme Court, says: (p. 638.)

> "A writ of error from the Federal Supreme Court to the State Court, will be dismissed, where the Federal question relied upon to confer such jurisdiction manifestly lacks all color of merit."

This Court said in Equitable Life Assurance Society vs. Brown, 187 U. S. 308-311:

> "But it is well settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real, substantive question on which the case may be made to turn; that is, a real and not merely formal Federal question is essential to the jurisdiction of this Court. Stated in another form, the doctrine thus declared is, that, although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to, leave no room for controversy, the motion to dismiss will prevail. New Orleans Water Works Co. vs. Louisiana 185 U. S. 336-345 and authorities there cited."

New York & N. E. Railroad Co. vs. Bristol, 151 U. S. 556;

Soutnern Railroad Co. vs. Carson, 194 U. S. 136;

Louisville & Nashville R. R. Co. vs. Melton 218 U. S. 36;

Easterling Lumber Co. vs. Pierce, 235 U. S. 380.

CONSTRUCTION OF STATUTE BY STATE COURT.

It is elementary law, that the validity of this Section 1985 of the Mississippi Code of 1906 under the State Constitution, cannot be considered in this Court.

> "If a State Statute has been construed by the highest State Court, it is the duty of this Court to determine its constitutionality under the Federal Constitution as so construed."
>
> Chicago, Ind. & L. Ry. vs. Hackett, 228 U. S. 559.

> "The question of validity of a State Statute under the State Constitution is foreclosed in this Court by the decision of the highest Court of the State."
>
> City of Chicago vs. Sturges, 222 U. S. 313.

"An interpretation by the State Court of a State Statute is controlling in this Court."

> Clement National Bank vs. Vermont, 231 U. S. 120.

SECTION 1985 OF MISSISSIPPI CODE OF 1906 VALID.

This Court has, in plain and positive language, impossible of being misconstrued, maintained the validity of this identi-

cal statute. This same statute, when assailed in this Court upon identically the same ground, was sustained, in the Case of Mobile J. & K. C. R. R. vs. Turnip seed, 219 U. S. 35. This Court in that case said:

> "We are not impressed with the argument that the Supreme Court of Mississippi, in construing the act, has declared that the effect of the statute is to create a presumption of liability, giving to it, thereby, an effect in excess of a mere temporary inference of fact. The statutory effect of the rule is to provide that evidence of an injury arising from the actual operation of trains shall create an inference of negligence, which is the main fact in issue. The only legal effect of this inference is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done, the inference is at an end, and the question of negligence is one for the jury upon all the evidence. In default of such evidence, the defendant, in a civil case, must lose, for the prima facie case is enough as matter of law. The statute does not, therefore, deny the equal protection of the law, or otherwise fail in due process of law, because it creates a presumption of liability, since its operation is only to supply an inference of liability in the absence of other evidence contradicting such inference."

The Turnipseed case, supra, was approved by this Court in Lindsey vs. National Carbonic Gas Co. 220 U. S. p. 61.

> Reitter vs. Harris, 223 U. S. 437;
> Luria vs. United States, 231 U. S. 9.

That the Mississippi Supreme Court has, since the decision in this court of the Turnipseed case, supra, continued consistently to construe this section 1985 as cutting off no

substantive defense, but only providing a rule of evidence, controlling the burden of proof, cannot be questioned, after reference to its decisions thereon has been made.

In the case of Railroad Company vs. Thornhill, 63 So. Rep. 674 (Decided December, 1913,) the Mississippi Supreme Court, construing this section, said:

> "When the facts and circumstances under which the injury was inflicted have been ascertained, the presumption of negligence created by the statute disappears, and the defendant's negligence vel non must then be determined alone from such facts and circumstances, but that, even though the facts and circumstances are in evidence, and although there may be no conflict therein as to what these facts and circumstances are, unless they justify the court in directing a verdict, it is proper to charge the jury, on request of the plaintiff, that proof of injury by the running of the cars is prima facie evidence of negligence, and on request of defendant that, since the facts and circumstances under which the injury was inflicted are known, they will determine whether or not the defendant was negligent solely therefrom without resorting to any presumption of negligence."

Again the Supreme Court of Mississippi, in the case of Alabama G. S. Ry. Co. vs. Daniel, 66 So. Rep. 730 (decided December, 1914,) said:

> "The only effect of Section 1985 of the Code is to relieve the plaintiff from proving the facts and circumstances of an injury and to shift the burden of so doing to the defendant, but when this burden has been met and the evidence discloses 'the doing or omission of every act from the doing or omission of which an inference of negligence vel non could be drawn' the verdict of the jury must then be arrived at in the

same manner as it would have been in the absence of the statute; that is, it 'must then be according as they (the facts and circumstances) disclose the presence or absence of due care on the part of the defendant.'

"It is not necessary, under this statute, any more than it was before its enactment, that the proven facts and circumstances should exonorate the defendant—that is, that it should appear therefrom that he had acted with due care on the occasion in question—before he can be relieved from liability. On the contrary, under the statute, as before its enactment, when the facts and circumstances have been ascertained, the jury must be able to say therefrom that the defendant was guilty of negligence; otherwise, he cannot be held liable."

It is true that in the case at bar this statute was invoked by plaintiff below. The Supreme Court of Mississippi, however, held that there was "no material conflict in the evidence except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer. This question was a question of fact and its solution was submitted to the jury."

It further held that upon the proof offered by defendant below, there being no conflict, except as stated, the negligence necessary for a recovery (wilfulness and recklessness) appeared therefrom. The court then decided that, even though the instruction which invoked Section 1985 was in language too strong, yet under the **facts as found by the** court, no other verdict on the question of negligence in the running of the train, could be rendered. That finding of fact this court will not concern itself about. The court, then, in construing the effect and meaning of Section 1985, said:

"In order to meet the prima facie case made by the proof that the injury was inflicted by a run-

> ning train, it is not necessary for the defendant to do more than to disclose the facts, and if this is done, the liability of defendant depends upon the facts and not upon any statutory presumption."

The identical statute was again before this court and was subjected to the same assault as late as December, 1914, in the case of Easterling Lumber Company vs. Pierce, 235 U. S. 380. This Court there said of this statute:

> "The objection to the second statute is that it was wanting in due process because retroactively applied to the case, since the statute was enacted after the accident occurred. But the court below held that the statute cut off no substantive defense, but simply provided a rule of evidence controlling the burden of proof. That as thus construed it does not violate the fourteenth amendment to the Constitution of the United States is also so conclusively settled as to again require nothing but a reference to the decided cases. As it results that at the time the writ of error was sued out it had been conclusively settled by the decisions of this court that both grounds relied upon was devoid of merit, we think the alleged constitutional questions were too frivolous to sustain jurisdiction, and we therefore maintain the motion which has been made to dismiss, and our judgment will be, dismissed for want of jurisdiction."

Surely no objection to this statute can be based on the ground that the classification for which it provided was so unequal as to cause the statute to be in conflict with the fourteenth amendment. The classification is this: "Railroad corporations and all other corporations, companies, partnerships and individuals, using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever

power, and running on tracks." This **identical** classification was upheld, and objection thereto on the ground here assigned was expressly held to be so clearly without merit "as to require onl yreference to the decided cases to that effect." The motion to dismiss was sustained.

Easterling Lumber Co. vs. Pierce, 235 U. S. 380.

Since the foregoing propositions have been so clearly settled, and the argument thereon, by the repeated decisions of this court, "foreclosed," there is but one result, and that is the motion to dismiss be sustained. In view of this fact, and the further fact that the same distinguished counsel who appeared for Plaintiffs in Error in the Easterling Lumber Company case, supra, appear here for these Plaintiffs in Error, the conclusion is logically reached, that this writ of error is prosecuted **solely for the purpose of delay.**

ALLEGED VIOLATION OF THE HEPBURN ACT IS NO DEFENSE.

It is claimed by the Plaintiffs in Error, that, because the Defendant in Error was riding on the locomotive of an interstate train, on an interstate journey from Canton, Mississippi, to Memphis, Tennessee, when injured by the wilful, wanton and gross negligence of the engineer who had given him permission to ride, he cannot recover.

That part of the Hepburn Act material to this question is as follows:

> "No common carrier subject to the provisions of this act shall, after January 1st, 1907, directly or indirectly issue or give any interstate free ticket, free pass, or free transportation, for passengers, except to

its employes and their families," etc. (Section 1 of the Act.

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense on conviction shall pay to the United States a penalty of not less than $100.00 nor more than $2,000.00, and any person other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subjected to a like penalty."

It is further claimed that, by Section 20 of the Hepburn Act, the Interstate Commerce Commission was given authority to make regulations governing the issuing and recording of passes; that, by Section 26 of the these regulations, it is provided that no person can be carried with a pass duly issued and recorded, except train crews, sleeping car, chair car, and dining car employes, etc. So it is contended, that if Messina was **not** an employe, he was violating the express provisions of Section One of the Hepburn Act; if he was to be regarded as an employe, he was violating this rule 26 of the Interstate Commerce Commission's regulations, because no **pass** had actually been issued to him.

It was held by the Mississippi Supreme Court that, under the facts disclosed by the case at bar, neither the Hepburn Act nor the regulation of the Interstate Commerce Commission had any application, since it was clear that the engineer had no authority to give a free pass or to bind the company in that regard. Inferentially, the court held that it was not necessary to determine whether or not the violation of the Hepburn Act would have constituted a defense, since it held there had been no violation of that Act.

Of course, if a violation of the Hepburn Act would be no defense, then the fact that the Supreme Court of Mississippi held that there had been no violation of the act does not raise a real, substantial question for this court; it could only raise a formal question, and one wholly without merit, provided it is shown that this court has expressly decided, that

a violation of this very Act of Congress, known as the Hepburn Act, constitutes no defense in an action for negligence, because the Hepburn Act provides in terms its own penalty.

This Honorable Court has so held, after a careful consideration of the question, which was raised directly and presented squarely to this court for decision.

The case in which this Court has for all time setted this question, and "foreclosed" any argument thereon, is the case of Southern Pacific Railroad Company vs. Schuyler, 227 U. S. 601. In that case a mail clerk, then off duty, while riding in the baggage car, was killed by the negligence of the Railroad Company. It was decided by this Court that it was not necessary to decide whether or not the prohibitions of the Hepburn Act against free passes applied to deceased. This was because the Court held that the Hepburn Act was no defense, in the following language:

> "As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn Act is such as to deprive one who, in good faith, and without froud, and with the consent of the carrier, but in actual though unintentional violation of the prohibitions of the Acts, accepts a free pass in interstate transportation, of the benefit of the rule of local law that renders the carrier in such circumstances responsible for exercising care of the passenger's safety, because the carrier has voluntarily undertaken the burden of such care. But the Act itself declares what penalties shall be imposed for the violation of its provisions: 'Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty not less than $100.00 or more than $2,000.00, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.' This penalty is not to be enlarged by construction. Neither the letter nor the

spirit of the act makes an outlaw of him who violates this provision by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb or safety, and no more forfeited his right to the protection accorded by the local law to passengers in his situation, than the carried forfeited his right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being, of whose safety the Plaintiff in Error had undertaken charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage under such circumstances of the benefit and protection of the law of the state in this regard.

"It results that the judgment under review must be affirmed irrespective of the question of whether the Hepburn Act forbids the giving of free interstate transportation to the employes of the railway mail service when not on duty."

The right of action which the Defendant in Error asserted and sustained in the court below was not derived from any contract, and was therefore not deduced from any supposed violation of the Hepburn Act. It arose from the obligation created by law, as construed by the State court, not to wilfully and wantonly injure him, after permitting him to get aboard the engine. In truth, this principle of law is not controverted or questioned by any decided case in any court. We cite only a few cases:

Delaware L. & W. R. Co. vs. Troutwein (N. J.) 7 L. R. A. 435;

Carroll vs. Staten Island R. Co. (N. Y.) 17 Am. Rep. 221;

Opsahl vs. Judd (Minn.) 14 N. W. 575;
Southern Pacific vs. Schuyler, supra.

The violation of the Hepburn Act, assuming for the sake of argument, that the Defendant in Error here was guilty thereof, was in no sense the cause of his injury, nor did he have to rely upon such illegal act in order to make out his case. It was only the occasion for his injury by the Railroad Compnay's wilful, wanton and grossly negligent act, as held by the State Supreme Court. It was merely a condition, and was not a contributing cause. This proposition is not questioned by any decided case.

Delaware L. & W. vs. Troutwein, (N. J.) 7 L. R. A. 435;

Jacobus vs. St. Paul R. Co. (Minn.) 18 Am. Rep. 360.

In short, this Court, in the Schuyler case supra, decided long before this Writ of Error was granted, was only applying the Hepburn Act and its supposed violation to known, established and uncontroverted legal principles. The decision of that case is absolutely conclusive of the question raised here on the Assignment of Error.

In Watson on Damages for Personal Injuries, Section 230, it is said:

> "At the outset it may be stated, as a general rule, that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act, is not sufficient to relieve the author of the wrong of liability in damages therefor. The question how far a person can defend an otherwise indefensible act, it has been said, by showing a criminal or unlawful act on the part of the party in-

> jured, has of late years been fully discussed in the courts of this country and England. The result generally reached, is that no man can set up a public or private wrong committed by another, as an excuse for a wilful or unnecessary, or even negligent injury to him or his property. This principle is defended on the ground of morality and law, and it reaches and determines a great variety of cases."

In the case of Sutton vs. Wauwatosa (Wis.) 9 Am. Rep. 534, Chief Justice Dixon, of the Supreme Court of Wisconsin, said:

> "Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the state, and thus to impose upon him a penalty many times greater than what those laws prescribe. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail."

The Courts are unanimous in holding that a carrier in transporting a person in violation of constitutional or statutory provisions cannot rely upon the violation of such provisions to evade the consequences resulting from personal injury through the negligence of the carrier. This is but another way of saying that the one guilty of negligence (and certainly of wilful or wanton negligence, Phila. & R. Co. vs. Derby, 14 Howard 502) cannot justify his own wrong doing by saying that the injured person was himself guilty of a wrong. The following cases sustain this contention, and in fact there is no dissent:

> John vs. Northern P. Ry. Co. (Mont.) 32 L. R. A. (N. S.) 85;

Gabbert vs. Hackett (Wis.) 14 L. R. A. (N. S.) 1070;

Bradburn vs. Whatcom Co. Ry. Co. (Wash.) 14 L. R. A. (N. S.) 526;

Carroll vs. Staten Island R. Co. (N. Y.) 17 Am. Rep. 221;

Delaware L. & W. R. Co. vs. Trautwein (N. J.) 7 L. R. A. 435.

The holding of the Supreme Court of Mississippi on the question of the application of the Hepburn Act to the state of facts presented by this record is so clearly correct in principle that citation of authority or argument thereon is useless. Aside from this, however, it is a question which was not necessary for the Mississippi Supreme Court to decide, and one which this Court is not called upon to decide, because, as stated in the Schuyler case Supra, even if the Supreme Court of Mississippi, as in fact the Supreme Court of Utah in the Schuyler case had done, had decided the question wrong, when it comes to this court the supposed violation constitutes no defense.

MOTION TO AFFIRM.

We respectfully submit that it is apparent that the writ of error was taken solely for delay, and that the questions presented by the assignment of error are so frivolous as to need no further argument, and are absolutely without merit. This is because the Statute (Section 1985) of the Mississippi Code, (the one here now assailed) was **twice** by this Court, **before** the writ of error herein was sought, upheld, and any argument attempted to be made again it "expressly foreclosed," making the Federal question purely a formal one. Also because the defense claimed by virtue of a supposed violation of the Hepburn Act, had, by the decision of this Court in the

Schuyler case, supra, before the writ of error in this case, been expressly denied and the question finally settled.

We therefore respectfully invoke the present Subdivision 5 of Rule 6:

> "The Court in any pending cause will receive a motion to affirm on the ground that it is manifest that the writ or appeal was taken for delay only, or that the questions on which the decision of the cause depend are so frivolous as not to need further argument. The same procedure shall apply to and control such motion as is provided for in cases of motions to dismiss under Paragraph 4 of this rule."

If jurisdiction is maintained we invoke the rule announced by the Missouri P. Ry. Co. vs. Castle, 224 U. S. 511, wherein Chief Justice White said:

> "Defendant in Error moves to affirm the judgment under Subdivision 5 of Rule 6. The motion we think should prevail, since the questions urged upon our attention as a basis for reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary."

We also respectfully invoke the doctrine announced in Deming vs. Carlisle Packing Co. 226 U. S. 102, through Chief Justice White, that, as the

> "conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a Federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the Federal question. The decisions of this court also leave it no longer open to discussion that where it is found that a Federal que-

> tion upon which a writ of error is based is unsubstantial and frivolous, the duty to affirm results."

We call the Court's attention to the following cases where, under the above rule, damages were allowed:

> Prentice vs. Pickersgill 6. Wal. 511, where 10% was allowed;
> Barrow vs. Hill, 13 Howard 54, where 10% was allowed;
> Texas & Pacific R. Co. vs. Volk 151 U. S. 73, where 10% was allowed;
> Deming vs. Carlisle Packing Co. 226 U. S. 102, where 5% was allowed;
> Southern Railway vs. Gadd, 233 U. S. 572, where 5% was allowed.

In view of what has been said, and the fact that the Federal questions here relied upon were not considered of enough importance to raise them in the court of original jurisdiction, or in the Supreme Court of the State, and that each of them had, by the decisions of this court, been expressly decided to be without merit, we are forced to conclude that the attitude of Plaintiffs in Error, is, as stated by Mr. Justice Brown, in Chicago, etc., R. R. vs. McGuire, 49 Law Ed. 413,

> "This case is the not infrequent one of an attempt to clutch at the jurisdiction of the court as an after-thought, when all other resources of litigation have been exhausted."

We therefore respectfully request that interest, and ten per cent damages, be allowed, as authorized by Subdivision 2 of Rule 23.

Respectfully submitted,

Wm. N. Watkins

Attorney for Defendant in Error.

Barton & Henry

Bush & Thicker

Of Counsel.

RECORD.

PORTIONS OF THE RECORD EMBODYING ALL THE MATERIAL AND PERTINENT PARTS OF TRANSCRIPT, WHICH RELATE TO THE MOTION FILED HEREIN.

DECLARATION.

IN THE CIRCUIT COURT OF
HOLMES COUNTY, MISSISSIPPI.
FEBRUARY TERM, 1913.

V. P. MESSINA, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY AND YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendants.

The plaintiff, V. P. Messina, by his attorneys complains of the defendants, Illinois Central Railroad Company and Yazoo & Mississippi Valley Railorad Company, of a plea of trespass on the case, and for cause of action alleges as follows, to-wit:

On the ———— day of July, 1912, the said defendants were each railroad corporations, engaged in the business of carrying passengers and freight for hire, as common carriers, within the State of Mississippi, and were partners in trade and in the business aforesaid, operating said railroads, as partners aforesaid, in Holmes County, Mississippi, and in other counties; that on the track of the Illinois Central Railroad Company, on the day aforesaid, the defendants were operating a passenger train, which ran from Canton, Mississippi, to Memphis, Tennessee, being Number Two; that said train was being

operated by the then agents and servants of defendants in charge of said train, as common carriers of passengers for hire; that the plaintiff, V. P. Messina, was riding upon the engine of said train, by permission of the agent of the defendants in charge of said engine, and, while so riding, the said V. P. Messina was injured, by the negligent running of said train, on said date, at a point about three miles south of Winona, in Montgomery County, Mississippi, said injury being caused by the negligent running of the said train as aforesaid, by which the said train was caused to leave the track, and the engine thereof to turn over, causing the injury to plaintiff hereinafter named.

Plaintiff alleges that, by reason of said negligence, and the turning over of said engine, plaintiff's right leg and right arm were broken, and his back was injured, and the wrist of his right hand was injured, so as to render the same stiff and useless; that the breaking of the plaintiff's leg and arm was such as to render each of said limbs entirely useless and permanently destroyed; that, by reason of said injury, the plaintiff lay in bed for many months, and, in order to save his right leg, had seven separate and distinct surgical operations performed upon him, each of which caused him great pain and suffering, and, since the date of said injury, the plaintiff has constantly suffered great pain and injury, and continues to suffer, and will continue to so suffer during the remainder of his life; that, in an effort to save the life of the plaintiff, he expended over $2,000 in money, for medical and surgical and hospital treatment, all of which has entirely failed to relieve the plaintiff, so that, at this time, by reason of the negligence of the defendant aforesaid, he has been rendered a helpless cripple during the remainder of his life, and renderd incapable of working or of earning any money; that, before said injury, the plaintiff was a strong, healthy, active man, earning large sums of money, to-wit:

More than $100 per month, and being a young man only twenty-four years of age; the plaintiff has been rendered wholly incapable of earning any money or performing any manual labor.

By reason of the injury and negligence aforesaid, he has been damaged in the sum of $25,000, and brings this suit against defendants, and prays judgment for said sum of $25,000 and his costs in this behalf expended.

Count 2.

And for further count, the plaintiff says as follows: The defendants aforesaid, at the time and place aforesaid, were operating a passenger train as aforesaid, and as partners as aforesaid; that, at Canton, on defendants' Illinois Central Railroad Company's railroad, the plaintiff was given permission, by the engineer then in charge of said engine, and who was then and there the agent and servant of defendants, in charge of said train, to ride upon said engine; that the plaintiff, with permission as aforesaid, did enter upon said engine, and was riding thereon, the said train proceeding north; that the agent and servant of the defendant in charge of said engine, having given the plaintiff permission to ride thereon, owed him the duty not to recklessly, or wilfully or wantonly, or in a grossly negligent manner, injure him, and owed him the further duty to operate said engine in such a way as not to wilfully, wantonly, recklessly, and in a grossly negligent manner cause injury to plaintiff, or any other persons riding upon said train; that the said agent and servant of the defendant, in charge of said engine as aforesaid, knowing that the plaintiff was then and there riding upon said engine, wilfully, wantonly, recklessly, and in a grossly negligent manner, and in utter disregard of the rights or safety of the plaintiff, ran said engine into water that was then passing over the track of the defendant, and upon and into a trestle that had been washed out, after receiving full knowledge and notice that the track of the defendant was under water, or defective, because of continued rains, by reason of which wilful, wanton, reckless, and grossly negligent conduct, upon the part of the agent and servant of the defendant in charge of said train, the said locomotive and cars of said train were caused to turn over and leave the track of the defendants, causing the plaintiff to be held between a part of the wreckage of the said engine, and causing

him injury and damage as set forth in this declaration; by reason whereof, the plaintiff had been injured and damaged as set forth in the first count of this declaration, and prays damages against the defendants in the sum of $25,000 and his costs in this behalf expended.

Count 3.

And for further count, the plaintiff alleges as follows, to-wit: The defendants aforesaid, at the time and place aforesaid, were engaged in the business aforesaid, as partners aforesaid, and were operating a certain passenger train as aforesaid, and the plaintiff was then and there an employe of the defendant, Illinois Central Railroad Company, as a switchman in the yards of the defendant at Jackson, Mississippi; that, at the time aforesaid, the plaintiff was temporarily off duty and upon a short vacation of a day or two; that it was the known, recognized, and established custom of the defendants to carry the employes of the defendants from place to place upon the defendants' line, such custom and practice being known to the plaintiff; that, pursuant to such custom, the plaintiff, not having obtained a pass, as the defendants' said custom entitled him to, and which was a part of his contract of employment with the defendant, obtained and was given permission, by the then agent and servant of the defendants in charge of the said locomotive, to ride from Canton to Memphis; that the said engineer gave permission to the plaintiff to ride on said engine, then knowing and recognizing the custom of the said defendants to so carry their employes; and the said agent and servant of the defendants, in charge of said engine as aforesaid, after accepting the plaintiff upon his engine, pursuant to the custom and rule as aforesaid, owed to the plaintiff the duty to handle the said engine with reasonable care and caution, so as not to inflict injury or harm upon the plaintiff, or any other persons riding upon said train; that the said engineer, after accepting the plaintiff upon said engine, pursuant to said rule and custom aforesaid, and knowing that the plaintiff was riding thereon, received orders or warning that the track of the defendant, at or near the town of Winona, on defendant's said

railroad, was either under water, or in such condition that made it proper that the said engine should be run with care and caution over said track; that, after receiving such notice or warning, which warning was that the said engineer should proceed with great caution at the point aforesaid, the said engineer wilfully, wantonly, recklessly, and in utter disregard of the safety of the plaintiff and passengers upon said train, ran said train at a rate of sixty miles an hour along the very point where he had been given warning to proceed with great caution, and upon and into water which was passing over the track of the defendant, for a distance of several hundred yards, which was rendered defective because of the water being over it as aforesaid; that, by reason of said wilful, wanton, and reckless conduct, the engine and cars of said train were turned over and thrown from the track and wrecked, and the plaintiff injured as set forth in the first count of this declaration, and therefore plaintiff brings this suit for said injuries, and prays damages against the defendants in the sum of $25,000 and his costs in this behalf expended.

Count 4.

And for further count, the plaintiff says that the defendants aforesaid, at the time and place aforesaid, were operating said passenger train as aforesaid, and were partners as aforesaid, and the plaintiff, riding upon the defendants' engine as aforesaid, became and was a mere trespasser thereon, and was not a wilful trespasser, and there was no danger while the plaintiff rode upon said engine, so long as the same was not handled in recklessly, wilfully, or wantonly negligent manner; that the said plaintiff being a mere trespasser or licensee as aforesaid there was owing to him the duty, by the agents and servants of the defendant in charge of said engine not to handle the same wilfully, wantonly, and recklessly, negligently, or in a way that would wilfully and wantonly and recklessly cause injury or damage to the plaintiff; that the agents and servants of the defendant wholly failed in this regard, and, while plaintiff was riding on said engine, with knowledge of the agent of the de-

fendant in charge of said engine, the said engine, by said agent aforesaid, was wilfully, wantonly, and in a grossly negligent manner, and in a manner which evinced an utter disregard of the rights or safety of the plaintiff, run into water, and into a defective trestle, after receiving warning and notice of the danger and of the caution necessary to be exercised in the handling of said engine, at a point a few miles south of Winona, and by such negligence and wilful, wanton, and reckless conduct, upon the part of the agents and servants of the defendant, caused the injury and damage to the plaintiff as alleged in the first count of this declaration.

And therefore the plaintiff brings this suit, and prays judgment against the defendants in the sum of $25,000 and his costs in this behalf expended.

BARBOUR & HENRY,
BURCH & STRICKER,
Attorneys for Plaintiff.

Filed January 20th, 1913.
J. D. WEEKS, C. C.
By E. V. ASHLEY, D. C.

Pleas and Notice of Defendants.

(Title of Cause.)

And the said defendants by their attorneys come and defend the wrong and injury when etc., and say that they are not guilty of the premises in manner and form as the plaintiff has in his declaration alleged; and defendants jointly and severally deny each and every allegation in each and all the counts of said declaration and of this the defendants put themselves upon the country.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

MAYES & MAYES,
Of Counsel.

The defendants in this cause hereby give notice to said plaintiff that they will offer evidence under the general issue to prove that said plaintiff was one of seven of his kind, who were beating their way North on train No. 2 at the time he was injured; that he was riding on the rear sill of the engine tank at the time he received the injury complained of, and was there riding at the time of the derailment of the train.

That on the arrival of train No. 2 July 18th, 1912, at Durant, plaintiff was one of four tramps who got out from the first "blind" immediately back of the engine tender on the east side of the train, which was the dark side. They were seen by the police officer W. R. Johnson and begged him not to arrest them and send them to the farm, and plaintiff said he was out of a job and had no money, and that they were on their way to Memphis; that the officer told them not to do it and reminded them of a wreck a few days before in which some hoboes were killed near Winona. He told them he would not arrest them if they would leave town, and warned them to keep off that train, which they promised to do. Plaintiff with three others started North about the time the train pulled out and running along beside the train all four succeeded in getting back again on the train at the same place they were riding before.

That the cause of the derailment was due to train No. 2 running into a stretch of track at bridge 643-01, from which the gravel ballast had been washed for a distance of 350 feet by overflow from Murrels Branch, a small creek that crosses the railroad at that point.

That the rainstorm in the vicinity of Flotz and Winona was not unusually hard, and the evidence at bridge 643-01 and the observations made west of the railroad and along Murrels Branch and the absence of high water in the immediate vicinity south of this point, showed that the water that overflowed the track was due to a very hard rainstorm about two miles west of the railroad on Murrels Branch. That where the track washed out it is higher than at any other point for three-fourths of a mile north and several miles south, and is usually not affected by overflow. That trains, including No. 2,

were notified of prevailing weather conditions in as much detail as was obtainable, and that train No. 2 had lost nine minutes between Durant and point of derailment on account of the message in possession of the crew regarding rain in that territory, although it did not rain on train No. 2 between these points, and that the speed of the train was between 20 and 25 miles per hour when derailed, as against the usual rate of about 55 miles per hour.

That the headlight of engine No. 1062 was burning brightly, crew had proper rest prior to starting on trip, and that the extreme darkness together with the presence of curvature in track and a rise in grade immediately south of bridge 643-01 operated to obscure the view ahead.

Defendants will introduce rule 728 of the Transportation Department of the Illinois Central Railroad Company which reads as follows: "No person will be permitted to ride on an engine, or any baggage, mail or express car (except employes in the discharge of their duties) without a written order from the Superintendent."

It is not only contrary to the rules, but the engineer himself has no right to waive it and permit people to ride on his engine, whether they be in the employ of the company or or not.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendant.

SPECIAL PLEA OF DEFENDANTS.

(Title of Cause.)

The defendants by their attorneys, come and say jointly and severally, that they do not admit the existence of any partnership between them; but while this is true, they do not care to raise any issue as to this allegation of the plaintiff, in the several counts of his declaration, since in the end the matter can be easily solved between the defendants them-

selves, and the proper company will pay whatever judgment may be rendered against either or both.

And said defendants by their attorneys come and defend the wrong and injury when etc. and say, that they are not guilty of the premises in manner and form as the plaintiff has in his declaration alleged, and defendants deny each and every allegation in each and all the counts of said declaration. And of this the defendants put themselves upon the country.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

Filed Feb. 24th, 1913.
J. D. WEEKS, C. C.
By E. V. ASHLEY, D. C.

NOTICE BY PLAINTIFF OF SPECIAL MATTER.

(Title of Cause.)

The defendants will take notice that the plaintiff intends to give in evidence in denial or avoidance of the special matter set up in the notice set up by the defendants under the plea of the general issue, as follows:

A specific denial will be made that the plaintiff was warned by W. R. Johnson, or any other person, at Durant, but will show that he was riding on the engine by permission of the engineer, who, by the custom known and recognized by the defendants, had authority to permit the plaintiff to ride thereon.

He will further show that the place where the engine was wrecked was not higher than at other points of the track, and was not a place where the defendant had a right to expect that no accident would occur, but will show that the place was one where an accident would occur, by reason of the trestle being washed out because of rains, admitted by the defendant in its special notice to have occurred, and will further show that, at the identical point, shortly before the accident involved in this case, another train of the defendant was ditched, be-

cause of the condition of the track at that point, due to rains.

The plaintiff will further show that, at the time of the accident, a blinding rain was falling; that the train was traveling at a rate of more than sixty miles an hour; that there was no curve where the engine left the track, and that, by the rules of the company, the duty was upon the engineer to keep a close and vigilent watchout when running his engine during a storm, or just after a storm, such as the one in progress at the time of the accident.

Plaintiff will further show that no such rule set out in the special notice exists, but, on the contrary, under the rules of the company, the engineer was responsible for the engine, and had authority, by rule and by recognized and known custom, to permit employes to ride thereon.

BARBOUR & HENRY,
Attorneys for Plaintiff.

INSTRUCTIONS GIVEN PLAINTIFF. (Deft. in Error.)

No. 1.

The court instructs the jury that if you find for the plaintiff, that the form of your verdict will be "We, the jury, find for the plaintiff and assess his damages at the sum of $....., and you are further instructed that if you find for the plaintiff that it is your duty to find for such an amount as under the instructions and the evidence would be full compensation for the jury sustained by plaintiff, not to exceed $25,000.00.

(Verdict of the jury written on this Instruction.)

We, the jury, find for the plaintiff and assess his damages at the sum of Ten Thousand Dollars. ($10,000.00.)

No. 2.

The court instructs you that if you believe from the evidence that plaintiff was an employe of defendant, then tem-

porarily off duty, and was riding on the train with the permission of the engineer and that the engineer knowing that the plaintiff was on the engine or train, ran his engine at a point of two or three miles south of Winona, in a manner, which under all the facts and circumstances shown in evidence, showed recklessness and wilful or wanton negligence in the handling of the train, and that plaintiff was injured thereby, then it is your duty to promptly return a verdict for the plaintiff, giving him damages in a sum that will fully compensate him for all loss and damage sustained by him on account of the injury to him. And you are further instructed in assessing damages if you find for the plaintiff, to take into consideration all physical and mental pain suffered by plaintiff from the time of the accident to the present time, as a result of his injuries, and all pain and suffering, if any, which he will likely suffer in the future, the loss of time by plaintiff since his injury, and the loss of time, if any, in the future that he will suffer, with any permanent impairment of the use of his arm and leg, if any, and also any permanent inability to perform physical labor, if any is shown, expense necessarily incurred in an effort to be relieved by medical and surgical aid, together with all the facts and circumstances shown in evidence relative to his injuries and sufferings, as a direct consequent of his injuries.

No. 3.

The court instructs you that by the use of the words wilful or wanton negligence used in the instructions in this case, it does not mean that the plaintiff must show an intention by the agents of the defendant to injure the plaintiff, but it is sufficient to show conduct manifesting a reckless disregard of consequences, under circumstances, where the act is done, or omitted to be done with probable or naturally resulting injury. In other words, an act done or omitted to be done with consciousness at the time that injury will probably or naturally result therefrom.

No. 4.

You are instructed that the plaintiff was injured by the running of defendants' train, and that therefore the defendant is presumed to have been negligent, and the burden is upon the defendant to show to you by satisfactory evidence that it was not liable, and by the same evidence to exonerate itself from blame. If all the evidence leaves it doubtful, or a matter of conjecture as to how the train was being run by the defendant's servants in charge of it, then the defendant has not met the burden, and it is your duty to find for plaintiff full damages for all injury sustained by him, the loss of time by him since his injury, and the loss of time, if any, in the future that he will suffer as a result of said injuries, any permanent injury, if any, together with any permanent impairment of the use of his arm and leg, if any, and also any permanent inability to perform physical labor, if any is shown, expense necessarily incurred in an effort to be relieved by medical and surgical aid, together with all the facts and circumstances shown in evidence relative to his injury and suffering, as a direct consequence of his injuries.

No. 5.

The court instructs you that after the injury to plaintiff, if you believe he was an employe then temporarily off duty, whether he had permission from the engineer to ride or not, the agents and servants of defendant's having taken him in charge, owed him the duty to use reasonable diligence to get him to medical and surgical attention, with the means then reasonably at hand, and if you believe from the evidence that they failed in this duty, then you should promptly find a verdict for the plaintiff, assessing such damages as will fully compensate him for the injury which he has suffered because of such failure.

No. 6.

The court instructs you that the fact, if you believe from the evidence that it is a fact, that plaintiff was leaving Jackson

because he got into trouble with some one there, does not of itself prevent him from recovering in this case.

No. 7.

The court instructs the jury that no presumption should be indulged in against the plaintiff by the jury in passing upon this case because it was filed in Holmes County; that the plaintiff has the right to bring his suit in any county in the state where the defendants' line of railway run and service of process can be had on such defendants.

INSTRUCTIONS GIVEN DEFENDANTS.

(Plaintiffs in Error.)

No. 3.

The court instructs the jury that if they find for the defendants the form of their verdict should be: "We, the jury, find for the defendants."

No. 4.

The court instructs the jury that there is no complaint in plaintiff's declaration or in this case for damages on account of failure to receive good medical and surgical attention from the time that he came into the charge of the defendant's surgeons and that he did receive such good attention is one of the established facts in this case.

No. 5.

The court instructs the jury for the defendant that the plaintiff not being on duty at the time he was injured the defendants were not obligated by the rules and regulations of their hospital department to pay any, nor all expenses incident to the treatment of said plaintiff for the injuries he received.

No. 12.

The court instructs the jury that if they believe from the evidence that defendants' employes, as soon as they knew of plaintiff's injuries in the wreck, extended to him reasonably good treatment and assistance; and aided him to get into the baggage car, and gave to him such treatment for his injuries as was then available, and carried him to the hospital with no unreasonable delay and continued such treatment from the time he was taken into the baggage car, and continued the same until after he was taken from the baggage car, to the hospital and such treatment while in the hospital, then the jury cannot find verdict for plaintiff on account of any treatment or failure to receive treatment for injuries after he received the same.

No. 15.

The court instructs the jury that if they believe from the evidence that the injury complained of by plaintiff occurred near a culvert over a stream on the top of a ridge, and that defendant had recently before that time put its track in good condition and elevated it, and that the train was in charge of a conductor and the engine of an engineer of long experience in operation of trains over that part of the railroad, and were competent for the discharge of their duties, and that the train was in every respect well equipped for service, and that a water spout and unexpected conditions put the track, just before the wreck, in the condition in which it was found by the train; and that the operation of the train was reasonable considering all the circumstances in evidence and that the wreck was due entirely to such unforeseen conditions, and that the engineer was looking ahead for the condition of the road, and did all he could to stop the train and avoid the wreck after he saw the track was under water, and was unable to do so, the jury will find for the defendants as to injuries complained of on account of the wreck, itself.

INSTRUCTIONS REFUSED DEFENDANTS.

(Plaintiffs in Error.)

No. 1.

The court instructs the jury to find for the defendant, the Yazoo & Mississippi Valley Railroad Company.

No. 2.

The court instructs the jury to find for the defendants, Illinois Central Railroad Company and Yazoo & Mississippi Railroad Company.

No. 6.

The court instructs the jury that the defendants at the time of the alleged injury owed the plantiff no duty except not to recklessly, or wilfully, or wantonly, or in a grossly negligent manner, injure him; and the jury will find for the defendants, unless they believe from the evidence that plaintiff was injured by the defendants recklessly, or wilfully, or wantonly, or in a grossly negligent manner. [But, the court further instructs the jury, that if you believe from the evidence that the plaintiff was unnecessarily neglected, in view of all the proven surrounding and attendant circumstances, from the time that defendants' employes at and about the wreck knew of his injuries and took charge of him, to the time they placed him in charge of the physicians and surgeons and that plaintiff suffered pain during such time of unnecessary neglect, then the plaintiff is liable for such suffering if any shown by the evidence and such neglect proven.]

Note: This instruction not used by defendant on account of modification by the court, contained in brackets above.

No. 7.

The court instructs the jury that the evidence in this case proves that defendants gave to plaintiff reasonable and proper assistance and medical and surgical attention after his injuries were known to the employes of the defendants; and that no verdict for damages can be given on account of the failure to give such assistance and treatment.

No. 8.

The court instructs the jury that the engineer of defendants' train operating the engine thereof at the time of the alleged injury had no authority under the rules of defendants to permit said plaintiff to ride on the train at the place he was in at the time of the alleged injury; and if the jury believe from the evidence that said plaintiff even though an employe of said defendants was guilty of a violation of the rule which prohibited him from riding in the position he was in, and his position on the tender was the direct and proximate cause of the injury he received, and had he been in one of the coaches of defendants instead of that position he would not have been injured, the law is for the defendants and the jury will so find.

No. 9.

The court charges the jury that though they may believe from the evidence that the plaintiff was an employe of the defendants at the time of his alleged injuries, if they further believe from the evidence, that he was not on duty at the time of his injuries, but, in collusion with others who were non-employes, was beating his way on defendants' train from Canton, Miss., to Memphis, Tenn., by riding on the engine and tender of the train, and was seated as alleged by himself on what is known as the tender, when the engine tender and other parts of the train were derailed and plaintiff was thereby injured, and that his position when the derailment occurred, contributed to his injuries and was the direct and proximate cause of his injuries, and without which he would not have been injured, and that after said derailment and its attendant

circumstances, said plaintiff was carried to defendants' hospital and given humane and proper treatment as soon as practicable under all the circumstances, the law is for the defendants, and the jury will so find.

No. 10.

The burden is upon the plaintiff to prove to the satisfaction of the jury and by a preponderance of the evidence that the plaintiff was injured recklessly or wilfully or wantonly or in a grossly negligent manner by the defendants; and if the plaintiff has failed in this and the evidence leaves their minds in equal balance as to whether plaintiff was thus injured by the defendants, they will find for said defendants as to the injury caused by the wreck.

No. 11.

The court instructs the jury that if they believe from the evidence that Messina knew that the passenger coaches were the proper places for passenger and if he further knew that his position on the tender was a dangerous place, and if they further believe from the evidence that plaintiff's being on the tender was the proximate cause of the injury received in the wreck, then neither the Illinois Central nor the Y. & M. V. R. R. Co. are responsible in damages to the plaintiff for injuries thus received.

No. 14.

The court instructs the jury that they shall find for the defendants, as to any damage directly caused by the wreck, unless the preponderance of the evidence in the case proves, that the engineer of the train involved in the wreck, wilfully intended to injure plaintiff or some other person or that the circumstances surrounding said engineer just before or at the time of the wreck were such as to have brought to him or to a reasonable man, situated as he was, the thought of the peril of plaintiff or of those with whom the plaintiff was then associated.

No. 16.

The court instructs the jury that any person who rides on an engine, tender, car or train of any railroad company, without authority or permission of the proper officers or employes of the company, is guilty of a violation of criminal law.

No. 17.

The court instructs the jury that if V. P. Messina was engaged in the commission of a crime at the time of receiving the injury complained of, and in consequence of his commission of such crime, and received it without any purpose or design of the employes of defendants or either of them, to inflict such injury on him, then the jury cannot return any verdict against the defendants or either of them, on account of such injury.

VERDICT OF THE JURY.

"We, the jury, find for the plaintiff and assess his damages at the sum of Ten Thousand Dollars. ($10,000.00.)"

JUDGMENT OF CIRCUIT COURT.

(Title of Cause.)

This day this cause came on to be heard, both the plaintiff and defendant appearing in person and represented by counsel, and issue being joined, it is considered by the Court that a jury come to try this cause when came a jury of 12 good and lawful men, to-wit: N. H. McPherson and eleven others, who being legally sworn to well and truly try the issue joined between the plaintiff and defendant and a true verdict give according to the evidence and the law, and who having heard all the evidence and argument of counsel for both sides, retired to their room having the instructions of the court, for their deliberations, and to consider of their verdict: And presently returned into open court the following verdict:

"We, the jury, find for the plaintiff and assess his damages at Ten Thousand ($10,000.00) Dollars;" it is accordingly considered by the court, that the said plaintiff do have and recover of and from the defendants, Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company the said sum of Ten Thousand Dollars, and all costs in this behalf expended, for which execution issue.

MOTION FOR A NEW TRIAL.

(Title of Cause.)

Now comes the defendants, by their attorneys, and moves the court to set aside the verdict and judgment rendered thereon in the above styled cause and to grant a new trial thereof, and assigns the following causes:

(1) The court erred in overruling defendant's motion to exclude the evidence at the conclusion of plaintiff's evidence and to grant peremptory instruction thereon.

(2) The court erred in excluding the evidence offered by plaintiff by Dr. T. R. Trotter in relation to the treatment and statements of plaintiff, as shown by bill of exceptions.

(3) The court erred in refusing to admit the testimony of Dr. J. A. Barksdale in regard to statements of plaintiff and the treatment of plaintiff after the same had been testified to by plaintiff as shown by the bill of exceptions.

(4) The court erred in excluding the evidence offered by Dr. Baskerville in regard to treatment of plaintiff as shown by bill of exceptions.

(5) The court erred in excluding testimony offered by defendants, and objected to by plaintiffs shown by various exceptions in stenographer's notes now offered to the court.

(6) The court erred in admitting evidence offered by plaintiff and objected to by defendants as shown by exceptions in stenographer's notes offered to the court to be read.

(7) The court erred in granting each of the instructions given to plaintiff, numbers 1, 2, 3, 4, 5, 6 and 7.

(8) The court erred in refusing each of the instructions asked by defendants and refused by the court, numbers 1, 2, 7, 8, 9, 10, 11, 14 and 17.

(9) The court erred in modifying the sixth instruction asked by defendants and withdrawn after being modified. Said instructions being modified by adding after the words, "negligent manner" the words "But the court further instructs the jury that if you believe from the evidence that the plaintiff was unnecessary neglected in view of all the proven and surrounding and attendant circumstances from the time that defendants employes at and about the wreck knew of his injuries and took charge of him to the time they placed him in charge of the physicians and surgeons and that plaintiff suffered pain during such time of unnecessary neglect then the defendants are liable for such sufferings if any shown by the evidence and such neglect proven.

(10) The verdict was contrary to the law and the evidence and for other causes to be assigned on the hearing of the motion for new trial.

(11) The court erred in permitting one of the attorneys for plaintiff, J. F. Barbour, to comment on the testimony of the witness Wm. Wood, and state that said Wood had testified that he would have taken plaintiff or one of his associates in the car as shown by special bill of exceptions taken by the stenographer.

(12) The court erred in permitting one of the attorneys of plaintiff, J. F. Barbour, to state that the fees collected from its employes were about $600,000.00 as hospital fees to be used to indemnify stockholders against any loss on account of this verdict, as shown by special bill of exceptions, presented on the hearing of this motion.

NOEL, BOOTHE & PEPPER,
Attorneys for Defendants.

Filed March 8, 1913.
J. D. WEEKS, Clerk.
By E. V. ASHLEY.

ORDER OVERRULING MOTION FOR NEW TRIAL.

(Title of Cause.)

This day came on for hearing the motion of the defendants to set aside the verdict of the jury and the judgment of the court and to grant a new trial to defendants upon the grounds stated in the motion on file: And the court having made an order during the civil term of the court, to hear said motion during the criminal term, and now heard said motion pursuant to said order and considered the same: It is considered by the court and so adjudged that said motion be and is hereby overruled, to which action of the court defendants then and there excepted this March 21st, 1913.

SECTION 1985 MISSISSIPPI CODE 1906.

1985 (1808) Injury to persons or property by railroads prima facie evidence of want of reasonable skill and care, etc. In all actions against railroad corporations and all other corporations, companies, partnerships and individuals using engines, locomotives, or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of the engines, locomotives, or cars of any such railroad corporations or such other corporations, company, partnership or individual shall be prima facie evidence of the want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership or individual in reference to such injury. This Section shall also apply to passengers and employes of railroad corporations and of such other corporations, companies, partnerships and individuals.

ASSIGNMENT OF ERRORS SUPREME COURT OF MISSISSIPPI.

STATE OF MISSISSIPPI,
COUNTY OF HINDS.

IN THE SUPREME COURT
TO THE OCTOBER TERM, 1913.

FIRST DISTRICT.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant,

No. 16861.

vs.

V. P. MESSINA, Appellee.

Assignment of Errors.

Comes the appellant by its attorneys, Mayes & Mayes, and prays the court to set aside the judgment of the Circuit Court, and assigns the following errors:

1. The verdict was contrary to the law and the evidence.

2. The verdict was for an amount grossly excessive.

3. The court erred in granting each and every instruction given for plaintiff, as set forth in the transcript.

4. The Court erred in refusing each and every instruction

refused to defendant company, and in sustaining objections of plaintiff thereto, as shown by the transcript.

5. The Court erred in excluding evidence offered on behalf of defendant company, and in sustaining objections of plaintiff thereto, as shown by the transcript.

6. The Court erred in overruling objections of the defendant to testimony and evidence offered on behalf of the plaintiff, and in refusing to exclude the same, as shown by the transcript.

7. The Court erred in overruling defendant's motion for a new trial, for the reasons set forth therein.

8. The Court erred in modifying the several instructions asked by defendants, in the respects shown in the bill of exceptions and transcript herein.

9. The Court erred in overruling defendant's motion made at the conclusion of plaintiff's testimony, to exclude the evidence and grant a peremptory instruction for defendant.

10. The Court erred in permitting palintiff's attorney to comment on testimony of witness Wm. Wood and state that said Woods had testified that he would have taken plaintiff or one of his associates on the car, as shown by the special bill of exceptions.

11. The Court erred in permitting plaintiff's attorney to state that the fees collected from its employes were about $600,000.00 as hospital fees to be used to indemnify stockholders against loss on account of this verdict, as shown by the special bill of exceptions.

Wherefore, the appellant prays that the judgment of the lower Court be reversed, and the cause remanded.

MAYES & MAYES,
Attorneys for Appellant.

JUDGEMENT OF SUPREME COURT.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

March Term, 1915.

APRIL 5TH, 1915.

YAZOO & MISSISSIPPI VALLEY R. R. COMPANY AND ILLINOIS CENTRAL R. R. COMPANY.

16861.

vs.

V. P. MESSINA.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Holmes County, and this Court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court render in this cause at the February Term, 1913, on the 7th day of March, 1913, be and the same is hereby affirmed, and that appellee do have and recover of appellants and J. B. Boothe, A. M. Pepper and Noel, Boothe & Pepper, sureties in the supersedeas bond the sum of Ten Thousand Dollars the amount of the judgment in the Court below, together with the further sum of Five Hundred Dollars, being damages at the rate of five per centum as allowed by law, as well as interest on the amount of said judgment from date of rendition till paid at the rate of six per centum per annum, and also the costs of this cause in this Court and in the Court below to be taxed, etc.

OPINION AND FINDINGS OF SUPREME COURT OF MISSISSIPPI. 67 So. 963.

COOK, J. Mr. Messina instituted suit against the railroad company for personal injuries, and recovered a judgment for $10,000. The defendant railroad company appeals.

The evidence for palintiff discloses that plaintiff had been employed by the railroad company as a switchman; that the day before the injury he had decided to lay off and go to Memphis, and in pursuance of this purpose he left Jackson on a freight train to go to Canton; he traveled deadhead, with the permission of the train crew, to Canton. About midnight of the next day he and several companions secured the permission of the engineer of the north-bound passenger train to ride on the tender of the locomotive from Canton to Memphis. The engineer denied this and said he had no knowledge that the party was on the tender. Before the train left Canton the engineer was given a telegram from the train dispatcher, which read: "More or less rain all over district tonight." The plaintiff, Messina, and his companions boarded the locomotive as it pulled out of Canton, and rode to Durant on the tender. When the train reached Durant the engineer received another telegram from the train dispatcher, reading:

"No. 5 reports water high between Beatty and Sawyer; have had very hard rains in there past 3 hours; water over the track but no damage reported, at Sawyer."

The train proceeded on its way. There was no scheduled stop between Durant and Winona. After the train passed Beatty it was then in the storm zone. The engineer testified that he then reduced his speed from 50 miles per hour to 35 miles per hour. At the place where the derailment occurred, and for some distance south thereof, a creek paralleled the railroad right of way, crossing the track under a trestle about 30 yards wide. About 250 yards south of this trestle there was a curve in the track, and the tresle could not be seen from a north-bound train until the curve was rounded. The locomo-

tive was running 35 miles per hour according to the engineer's testimony, and 50 to 60 miles according to plaintiff's evidence, when the water over the track came in view of the engineer, after he had passed the curve. The engineer said that he could not have stopped his train in less than 150 yards, meaning, perhaps, that if the train had remained on the track, it would not have been possible to have stopped the train in less than 150 yards. When the danger was discovered the emergency brakes were applied; the engine ran 100 yards, leaving the track in the meantime, and finally "laid down," with the machinery still running. Three of the cars attached to the locomotive were derailed, plaintiff was caught between the tender and one of these cars and permanently crippled. The extent of the injuries and the consequent suffering justify a verdict for the amount rendered by the jury.

There is no material conflict in the evidence, except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer. This question was a question of fact, and its solution was submitted to the jury. It is conceded by counsel for plaintiff that plaintiff was a trespasser, or a mere licensee, and that the defendant owed him no duty, except to refrain from wilfully and wantonly injuring him. If the engineer did not know that plaintiff was riding on the engine, it is conceded that plaintiff must lose his case. Accepting this as a correct interpretation of the law of the case, we find that the disputed question of fact was submitted to the jury.

[1] Appellant earnestly insists that the facts as to just how and why the wreck occurred, were proven, and therefore the instruction upon the prima facie statute (section 1985, Code of 1906) should not have been given. This contention, we think, is not supported by the record. If the evidence for plaintiff in regard to the speed of the train is to be taken as true, the negligence of the engineer was so flagrant that the court would have been warranted in instructing the jury peremptorily that his conduct was wanton and in reckless disregard of the consequences. If it can be said that the en-

gineer's estimate of the speed of the train raised a question of fact for the jury's decision, we think the conflict of evidence on this point was submitted to and decided by the jury.

[2] The instruction based upon the statute was a little too stout in some particulars, one of which is that the jury should not have been told, "if all the evidence leaves it doubtful," as to whether the defendant has not met the burden. As recently pointed out by this court in Gentry vs. Gulf & Ship Island R. R. Co., 67 South. 849, this language places a greater burden upon the defendant than the law requires it to sustain. In order to meet the prima facie case made by the proof that the injury was inflicted by a running train, it is not necessary for the defendant to do more than to disclose the facts, and if this is done the liability of defendant depends upon the facts and not upon the statutory presumption.

[3] The argument upon the alleged error of the trial court in refusing to give to the jury the counter instruction the defendant was entitled to receive if it had requested same. It is true that this court in the Thornhill Cace, 63 South. 674, and in the Daniell Case, 66 South, 730, said that:

> "When the facts and circumstances have been ascertained, they must be able to say therefrom that the defendant was guilty of negligence."

The court below would, no doubt, have so instructed the jury, if the defendant had seen fit to request such instruction. The defendant did not ask for this instruction, and cannot complain that the court did not do what the statute (section 793, Code of 1906) forbids him to do, unless requested in writing. By the uniform decisions of this court the circuit judge cannot volunteer instructions to the jury, and if he does so he has exceeded his power. The plaintiff's instruction stated his side of the case, and if the defendant had requested the counter instructions the law of the case would have been complete, except as to the defects noted in plaintiff's instruction.

Inasmuch as the trail court was not asked to give the counter instruction, and inasmuch as the court was without power to volunteer same, no error can be predicated of his failure to give the instruction.

[4] It is argued that the court did not limit the quantum of damages which plaintiff was entitled to recover, in accordance with the provisions of our concurrent negligence statute. Defendant did not ask an instruction along this line, and we think it was the error of defendant, rather than the error of the court, that defendant did not get the benefit of the law.

[5] In this case the train was a heavy passanger train, consisting of one mail and one express car, a baggage car, two day coaches, and five sleepers. The crew in charge of this train knew of the threatened danger, and when the train entered the danger zone, it seems to us that the engineer should have reduced his speed to the point where he could have brought it to a standstill in less than 150 yards. The evidence shows that he was rounding a curve in the road, and on account of the existing weather conditions he could not see further than 25 yards in front of his locomotive. This, we believe, was taking chances with the human lives in his charge, that was little, if any, short of a reckless indifference to the consequences. It appears that at this point especially the loss of time, as compared with the impending danger, was of no consequence and ordinary prudence required that the train should have been under perfect control to avoid the probable catastrophe. This being our view of the record, taken most favorably for defendant, it follows that the instructions criticized could not have prejudiced appellant.

[6] After the wreck appellant sent its own surgeons to take charge of the injured, and to carry them to the hospital at Winona. There was some evidence tending to show that plaintiff was not given that care and consideration which he was entitled to receive while he was at the scene of the wreck. To rebut this evidence appellant offered to prove by

its surgeons that they examined plaintiff at this time, and that his wounds had been dressed and properly treated, and that this was all that could have been done under the circumstances. At the instance of the plaintiff the trial court excluded this evidence from the jury. Section 3695 of the Code of 1906 provides:

> "All communications made to a physician or surgeon by a patient under his charge * * * are hereby declared privileged."

It will be noted that plaintiff was a patient under the charge of the surgeons selected by defendant. By our statute "all communications" made to a physician by his patient are privileged. It is argued by appellant that the evidence offered did not consist of "communications," by the patient to the physician; that the physician's information was gained by an inspection of the patient, and that the statute did not cover this character of evidence. Taken literally, this view of the statute may be sound, but when we consider the manifest policy of this sort of legislation, we believe that what appellant sought to prove was communicated to him by the patient. Except as a physician, he was not qualified to testify. His knowledge of the matter inquired about came to him from his examination of his patient. It is not necessary that the communication should be made by words in order to make it privileged. There is no more sacred relation of confidence than the relationship of physician and patient, and it was, in our opinion, the intention of the Legislature to close the lips of the physician concerning any and every thing he knows about the patient by oral communication or from a physical examination of his patient. Quoting from Briggs vs. Briggs, 20, Mich. 34:

> "He had no knowledge upon the subject except what he obtained in the course of his professional employment, and the case appears to be directly within the statute. * * * We do not understand the infor-

> motion here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting, with the veil of privilege, whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose."

The Supreme Court of Missouri had under review a statute similar to ours in Gartside vs. Connecticut Mutual Life Ins. Co., 76 Mo. 446, 43 Am. Rep. 765, and said:

> "The construction contended for by defendant's counsel that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient would, in our opinion, nullify the law. To hold that, while under the statute a physician would be forbidden from disclosing a statement made to him by his patient that he was suffering from syphilis, and to allow him to state as the result of his observation and examination of the patient that he was diseased with syphilis would be to make the statute inconsistent with itself. It is doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz, his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the Legislature and virtually to overthrow it."

The statutes of the several states vary in the language employed, but in our view they were all designed to accomplish the same purpose. Our statute in protecting the patient makes privileged "all communications," and we think it

would be absurd to say that what the patient says to the physician is privileged, but what is communicated to the physician by his expert examination and exploration of his patient's body is not privileged. The oral communications are usually of little importance, but the physical examination is always of prime importance. The fact that the physicians in the present case were not called by the plaintiff, but were sent by the defendant to examine or treat plaintiff, does not change the legal aspect of the case. The physicians were acting in their professional capacity, and the plantiff was their patient, and all communications to their professional senses are privileged, and the physician, however willing he may be to violate the confidence of his patient, will not be permitted to do so by the wise provisions of the statute. In the light of such authorities as we have been able to find, the overwhelming weight are in accord with this view of the law. The cases may be found in the notes to May Woods vs. Town of Lisbon, 16 L. R. A. (N. S.) 886.

[7] It is also contended by appellant that the plaintiff was violating the act of Congress to regulate commerce, approved June 29, 1906, and amended April 13, 1908, and June 18, 1910, which thus provides:

> "No common carrier subject to the provisions of this act, shall, after January 1st, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except * * * to their families, etc.
>
> "Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than $100 nor more than $2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty."

We do not understand that the act of Congress referred

to has any application to the facts of this case. The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling a passenger train under no conceivable circumstances has any power to issue free transportation to any person, and we are unable to see the force of the argument along this line. Certainly, a common carrier would not be liable to the penalty provided by the act of Congress should some employe, having no sort of connection with the transportation of passengers, assume to issue a free pass to some prohibited passenger. If an engineer could lawfully permit a person to ride free, it seems to us that the plaintiff in this case would be entitled to the same degree of care that other passengers are entitled to receive. This seems clear, unless the act of Congress would change the rights of the passenger. It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the act of Congress is not directed against acts of the character here involved. As we interpret the act of Congress and the regulations adopted by the Interstate Commerce Commission, neither are directed against acts such as are disclosed by the record in this case. After a careful review of the entire record, and after giving due consideration to the able and exhaustive briefs of counsel for appellant, we can find no error of sufficient importance to justify us in disturbing the judgment of the trial court. The Daniell Case seems to have been unduly mangnified. The gist of that case may be found in this sentence:

> "The rule invoked by the instructions here under consideration is one which should always be acted upon by the court in determining whether a peremptory instruction should be granted, but was not intended to be given in charge to the jury as a guide to be followed by it in arriving at its verdict."

The court did not, by this sentence, intend to say that it was improper to instruct the jury that proof of injury by the

running of the train was prima facie evidence of negligence. This court has repeatedly held that that rule could be given in charge to the jury, even when all the facts and circumstances were in evidence. The court merely held that the rule that "the circumstances of the accident must be clearly shown, and the facts so proven must exonerate the company from blame," was the rule for the guidance of the court in determining whether or not it could be said, as a matter of law, that the burden of the statute had been met and overthrown. Whether or not the giving of the instruction in the form critized in Daniell's Case will be held as prejudicial error will necessarily depend upon the facts of each case.

Affirmed.

PETITION FOR WRIT OF ERROR IN THE SUPREME COURT OF MISSISSIPPI.

UNITED STATES OF AMERICA,
STATE OF MISSISSIPPI:

ILLINOIS CENTRAL RAILROAD COMPANY, et. al.,

vs.

V. P. MESSINA.

Petition for Writ of Error.

To the Honorable Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi:

The petition of the Illinois Central Railroad Company and of the Yazoo & Mississippi Valley Railroad Company, and of J. B. Boothe, and A. M. Pepper, and of E. F. Noel, J. B. Boothe and A. M. Pepper, composing the firm of Noel, Boothe & Pepper, shows that on the 5th day of April, 1915, the said Supreme Court of the State of Mississippi, rendered judgment against the petitioners in a certain cause, wherein your petitioners, the Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, were the appellants, and the other petitioners were the sureties on their

appeal bond, and V. P. Messina was the appellee, affirming a judgment of the trial court, which judgment was in effect adverse to the petitioners, the two Railroad Companies, being for Ten Thousand Five Hundred Dollars, with interest at six per cent, on Ten Thousand Dollars from March 7th, 1913, to date, and for costs, and in legal effect awarded execution therein, as will appear by reference to the record and proceedings in said cause; and in said suit was drawn in question the applicability to said suit of certain statutes of the United States of America, to-wit: of Section 1, and of Section 20, of the Act of Congress to Regulate Commerce, commonly known as the Hepburn Act, approved June 29th, 1906, and amended April 13, 1908, and June 18th, 1910; and the decision of said Supreme Court denied the applicability to the said cause of the said Act of Congress, and of either section thereof; and that in said suit the said petitioners, who were the appellants, claimed the benefit of the said Act of Congress, and of both sections thereof, as conferring upon them an immunity from liability in the said suit, at the instance of the said appelee, and the said claim of benefit was by the said Supreme Court denied.

And the decision of said Supreme Court of the State of Mississippi was final, and the said Supreme Court is the Court of the highest resort in said State.

Wherefore, your petitioners are aggrieved, and they pray for a writ of error, with citation and supersedeas, returnable into the Supreme Court of the United States.

And as in duty bound, they will ever pray.

THE ILLINOIS CENTRAL RAILROAD COMPANY.
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

J. B. BOOTHE,
A. M. PEPPER,
E. F. NOEL,
NOEL, BOOTHE & PEPPER,
By MAYES & MAYES,
Attorneys.

STATE OF MISSISSIPPI:

Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the questions presented in the foregoing petition, and in the assignment of errors by which it is accompanied, it is ordered that a writ be, and the same is hereby, allowed to the said court, and that the same be made a supersedeas, the bond in the penal sum of Twenty-four Thousand Dollars, also herewith presented, being hereby approved.

In testimony whereof, witness my hand, this the 3rd day of June, 1915.

SIDNEY SMITH,
Chief Justice Supreme Court.

APPEAL BOND TO SUPREME COURT OF UNITED STATES.

KNOW ALL MEN BY THESE PRESENTS, that the Illinois Central Railroad Company, the Yazoo & Mississippi Valley Railroad Company, J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel, Boothe & Pepper, as principals, and The Canton Aberdeen & Nashville Railroad Company and The Chicago, St. Louis & New Orelans Railroad Company, as sureties, are held and firmly bound unto V. P. Messina in the sum of Twenty-four Thousand Dollars ($24,000.00), for the payment of which, well and truly to be made, we bond ourselves, our heirs, our successors, executors and administrators, jointly and severally, firmly by these presents.

Witness our signatures this the 3rd day of June, A. D., 1915.

The condition of the foregoing obligation is such that, whereas, lately, at the Supreme Court of the State of Mississippi, in a suit pending in said court between the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, Appellants, and said V. P. Messina, Appellee, judgment was recovered against the said Illinois Central Railroad Company and the Yazoo & Mississippi

Valley Railroad Company, Appellants, and J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel, Boothe & Pepper, their sureties, in and for the sum of Ten Thousand Five Hundred Dollars ($10,500.00), with interest thereon; and

Whereas, the said Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, and others against whom such judgment was rendered, have obtained a writ of error, and filed a copy thereof in the Clerk's office of said Court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said V. P. Messina, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days of the date thereof;

Now, therefore, if the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company, and their sureties, the said J. B. Boothe, A. M. Pepper, E. F. Noel, and Noel, Boothe & Pepper, shall prosecute their said writ of error to effect, and shall answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
By MAYES & MAYES,
Attorneys.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By MAYES & MAYES,
Attorneys.

J. B. BOOTHE,
By MAYES & MAYES,
Attorneys.

A. M. PEPPER,
By MAYES & MAYES,
Attorneys.

E. F. NOEL,
By MAYES & MAYES,
Attorneys.

NOEL, BOOTHE & PEPPER,
By MAYES & MAYES,
Attorneys.

THE CANTON, ABERDEEN & NASHVILLE RAILROAD COMPANY,
By EDWARD MAYES, Attorney in Fact.

THE CHICAGO, ST. LOUIS & NEW ORLEANS RAILROAD COMPANY,
By EDWARD MAYES, Attorney in Fact.

CITATION AND SERVICE IN SUPREME COURT OF UNITED STATES.

UNITED STATES OF AMERICA, ss:

To V. P. Messina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Supreme Court of the State of Mississippi, wherein the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company and J. B. Boothe, A. M. Pepper, E. F. Noel and Noel, Boothe & Pepper, are plaintiffs in error, and wherein you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error, mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Sidney Smith, Chief Justice of the Supreme Court of the State of Mississippi, this the 3rd day of June, A. D., 1915.

SIDNEY SMITH,
Chief Justice of the Supreme Court of Mississippi.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF MISS.

Received the within citation on the 4th day of June, 1915, and served the same on the within named, V. P. Messina, on the 4th day of June, 1915, personally, by delivering to him a true and exact copy of the same; also delivered to him at the same time a true and exact copy of the writ of error in the same cause, issued pursuant to the fiat of the Honorable Chief Justice of the Supreme Court of Mississippi, by L. B. Moseley, Clerk of the Circuit Court of the United States in and for the Southern District of Mississippi.

This the 4th day of June, A. D., 1915.

JOHN G. CASHMAN, U. S. M.
By C. B. FREENY, Deputy.

ASSIGNMENT OF ERRORS IN SUPREME COURT OF UNITED STATES.

UNITED STATES OF AMERICA,
SUPREME COURT OF THE UNITED STATES.

THE ILLINOIS CENTRAL RAILROAD COMPANY, et als, Plaintiff-in-Error.

vs.

V. P. MESSINA, Defendant-in-Error.

Assignment of Errors.

Afterward, to wit, on the 3rd day of June, 1915, before the Justices of the Supreme Court of the United States, at the capitol, in the city of Washington, come the said, the Illinois Central Railroad Company, and the said Yazoo & Mississippi Valley Railroad Company, and the said J. B. Boothe, A. M. Pepper, E. F. Noel and Noel, Boothe & Pepper, plaintiffs-in-error, by their, and each of their, attorney, Edward Mayes, and say that in the record and proceeding aforesaid, there is damaging error in the particulars following, to-wit:

First.—The said Supreme Court of the State of Mississippi erred in rendering the judgment of the fifth day of April, 1915, whereby the said plaintiffs-in-error were adjudged to pay to the defendant-in-error the sum of $10,500.00, principal sum, with interest, all as shown in the writ of error herein; and in holding and adjudging that the plaintiff's right of recovery was not barred and excluded by the operation of Sections 1 and 20 of the Act of Congress to regulate commerce, commonly known as the Hepburn Act, approved June 29th, 1906, and amended April 13th, 1908, and June 18th, 1910.

Second. The said Supreme Court also erred in holding and adjudging that the prohibition, penalties and disabilities arising under and because of the said Act of Congress to regulate commerce, did not apply in an instance like the one at bar, where the plaintiff was riding, from a point in Mississippi to a point in Tennessee, or claims to have been so riding, without payment of his fare, by virtue of permission or license extended to him to that end by the engineer in charge of the locomotive drawing the railway train.

Third. The said Supreme Court also erred in holding and adjudging that the prohibition, penalties and disabilities arising under and because of the said Act of Congress to regulate commerce, did not apply in an instance like the one at bar, where the plaintiff was riding from a point in Mississippi to a point in Tennessee, or claims to have been so riding, without payment of his fare, and secretly without a ticket, and without permission or license of the engineer in charge of the train, or other person claimed by him to have been authorized to grant such permission or license; in short, where plaintiff was stealing a ride, and was a trespasser.

Fourth. The said Supreme Court also erred in applying in and by such its decision and judgment the provisions of Section 1985 of the Mississippi Code of 1906; such application of said statute being in violation of the Fourteenth Amendment to the Constitution of the United States because appel-

lants were thereby deprived of their property without due process of law, and were denied the equal protection of the laws.

Fifth. The said Supreme Court also erred in holding and adjudging that a person riding on a passenger train from a point in Mississippi to a point in Tennessee without authority of law, and without a ticket or other written or printed evidence of his right so to do, is not thereby using "free transportation" within the meaning of that term as employed in the Act of Congress to regulate commerce, commonly known as the Hepburn Act, Approved June 29, 1906, as amended, and particularly Section 1 of said Act.

Sixth. The said Supreme Court also erred in holding and adjudging that a person not an employe of a common carrier does not violate the Act of Congress to regulate commerce, known as the Hepburn Act, approved June 29th, 1906, as amended, and particularly Section 1 of said Act, in riding from a point in Mississippi to a point in Tennessee without paying the regular, published and generally established lawful fare between such points.

Seventh. The said Supreme Court also erred in holding and adjudging that one in the employ of a common carrier does not violate the provisions of the Act of Congress to regulate commerce, known as the Hepburn Act, approved June 29th, 1906, and amendments thereto and particularly Section 1 thereof, by making a journey from Canton, Mississippi, to Memphis, Tennessee, without paying the lawful, published and established fare therefor, and without having obtained a pass or permit from the proper officer of the railroad company in accordance with the pass rules and regulations issued and promulgated by the Interstate Commerce Commission.

And the said Illinois Central Railroad Company, and the Yazoo & Mississippi Valley Railroad Company, and J. B. Boothe, and A. M. Pepper, and E. F. Noel, and Noel, Boothe

& Pepper, Plaintiffs in Error, pray that the judgment aforesaid may be reversed and annulled and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,

J. B. BOOTHE,
A. M. PEPPER,
E. F. NOEL,
NOEL, BOOTHE & PEPPER,
By EDWARD MAYES, Attorney.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* MESSINA.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 535. Argued February 23, 1916.—Decided March 6, 1916.

While the Anti-pass Provision of the Hepburn Act of 1906 may have had more formal uses especially in view than that of allowing a person to ride upon an interstate train by permission of an employé of the carrier, this court cannot limit the prohibition to such uses.

There being a question whether plaintiff, who was injured while riding free by consent of the engineer on the engine of an interstate train, could have recovered under state law had his presence been illegal under the Federal statute, *held* that it was reversible error not to have charged the jury that the Federal act applied.

THE facts, which involve the construction and application of the Anti-pass provision of the Hepburn Act of 1906, are stated in the opinion.

Mr. R. V. Fletcher, with whom *Mr. Edward Mayes* and *Mr. Blewett Lee* were on the brief, for plaintiffs in error.

Mr. Harry Peyton, with whom *Mr. William H. Watkins* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries suffered by the defendant in error while upon a train running from Mississippi to Tennessee. He had paid no fare but was upon the tender, as he said, by permission of the engineer. The engineer had noticed that the water was high between Beatty and Sawyer and over the track at Sawyer. After passing Beatty the train was going at a rate variously put as thirty-five to fifty or sixty miles an hour when it ran into the water and was thrown from the track. The plaintiff was caught between the tender and a car and badly hurt.

The plaintiff got a judgment for $10,000, which was sustained by the Supreme Court. At the trial the jury were instructed that the defendant railroad was presumed to be negligent and that if the evidence left it doubtful it was their duty to find full damages for the plaintiff. The judge refused to instruct them that the engineer had no authority to permit the plaintiff to ride on the train 'at the place he was in,' but the request for this instruction was based upon the company's rules, not upon the Act to Regulate Commerce. The Supreme Court, however, discussed the act of Congress and held that it did not apply to the case.

By § 1 of the act of Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, and still in force, any common carrier violating the provisions against free transportation is guilty of a misdemeanor and subject to a penalty, and any person other than those excepted 'who uses any such interstate . . . free transportation' is made subject to a like penalty. No doubt the enactment had somewhat more formal

uses especially in view, but we see no reason for limiting the prohibition to them. The word 'such' like 'said' seems to us to indicate no more than that free transportation had been mentioned before. We cannot think that if a prominent merchant or official should board a train and by assumption and an air of importance should obtain free carriage he would escape the Act. We are of opinion therefore that the Act was construed wrongly. Assuming, as it has been assumed, that the defendant's liability was governed otherwise by state law, it seems doubtful under the state decisions whether the plaintiff would have been allowed to recover had the court been of opinion that the act of Congress made his presence on the train illegal. *West Un. Tel. Co.* v. *McLaurin*, 66 So. Rep. 739. And although there are expressions in the opinion below that raise a doubt, the fact that the Supreme Court thought it necessary to construe the act indicates that the construction was material to the result. For this reason the judgment must be reversed.

Judgment reversed.

MR. JUSTICE HUGHES, dissenting.

The Supreme Court of the State held that the provision of the Federal act was not applicable to this case, and I think that the court was right. Congress did not concern itself with the possibility that prominent persons, or others, might steal a ride through the unauthorized action of some employee of the railroad company. Congress was concerned with the well known abuse which consisted in the giving of passes, or free transportation, by railroad companies, and it directed its legislation to that abuse. The provision is: "No common carrier subject to the provisions of this Act shall, . . . directly or indirectly, *issue* or *give* any interstate free ticket, free pass, or free transportation for passengers," except as stated; and

that "any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offence, on conviction shall pay . . . a penalty . . . and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty." Here, it was found that the engineer had no authority to give any free transportation to the plaintiff and I cannot but think that in this view the defendant in error was outside the Act. The Supreme Court of the State said: "The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling the passenger train, under no conceivable circumstances has any power to issue free transportation to any person, and we are unable to see the force of the argument along this line. . . . It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the Act of Congress is not directed against acts of the character here involved."

I know of no reason for disregarding the finding of the state court as to want of authority in the engineer, and it was on this hypothesis that the court held the Federal provision to be inapplicable. Aside from this ruling, it it is not suggested that any Federal question is involved.

I am authorized to say that MR. JUSTICE MCKENNA concurs in this dissent.